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No. _____

In The

Supreme Court of the United States

October Term, 1986

511 DETROIT STREET, INC., a Michigan corporation, and EXECUTIVE ART STUDIO, INC., a Michigan corporation,

Petitioners,

v

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, et al.,

Respondents,

and

DEQUINDRE BOOKS AND NEWS, INC., a Michigan corporation, and F. P. BOOKS AND NEWS, INC., a Michigan corporation,

Petitioners,

v

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

STEPHEN M. TAYLOR
STEPHEN M. TAYLOR, P.C.
20100 Civic Center Drive, Suite 300
Southfield, MI 48076 (313) 358-3590
Attorney for Petitioners

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

QUESTIONS PRESENTED

I.

WHETHER MCLA § 752.365 IS, AS WRITTEN, VOID FOR VAGUENESS AND REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

II.

WHETHER MCLA § 752.365 *ET SEQ.* IS, AS WRITTEN, AN UNDUE AND PROHIBITED BURDEN UPON THE EXERCISE OF FREE SPEECH AND PRESS, VOID FOR OVERBREADTH AND CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

III.

WHETHER MCLA § 752.365 *ET SEQ.* CONSTITUTES AN UNLAWFUL PRIOR RESTRAINT CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

IV.

WHETHER MCLA § 752.365 *ET SEQ.* IS REPUGNANT TO THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ON THE GROUNDS THAT ITS OPERATION AND EFFECT ESTABLISHES DIFFERENTIAL TREATMENT OF THE PRESS ABSENT A STATE INTEREST OF COMPELLING IMPORTANCE?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, 511 Detroit Street, Inc., Executive Art Studio, Inc., Dequindre Books and News, Inc. and F.P. Books and News, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

511 Detroit Street, Inc., Executive Art Studio, Inc., Dequindre Books and News, Inc., and F.P. Books and News, Inc., Petitioners, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 17, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at 807 F2d 1293 (1986) and is reproduced as Appendix A. The Opinion of the United States District Court, Eastern District of Michigan, Southern Division – Flint, in the matter styled, *511 Detroit Street, Inc., et al.* v *Frank J. Kelley, et al.*, is unreported, and is reproduced as Appendix B. The Opinion of the United States District Court, Eastern District of Michigan, Southern Division – Flint, in the case styled, *Dequindre Books and News, Inc., et al.* v *Frank J. Kelley, et al.*, is also unreported and is reproduced as Appendix C. The Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on February 13, 1987. A copy of the Order Denying Rehearing *En Banc* is reproduced as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1986, and the Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on February 13, 1987. This petition for writ of certiorari is being filed within ninety (90) days from the date of the denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc*, as required by *Title 28 USC § 2101, Subsection (c)*. The jurisdiction of this Court is invoked under Title 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States

and the provisions of Michigan Compiled Laws Annotated, § 752.361 through § 752.374 (P.A. 1984, No. 343) are set forth as Appendix E.

STATEMENT OF THE CASE

Petitioners, 511 Detroit Street, Inc. and Executive Art Studio, Inc., are corporate bodies duly authorized to do business in the State of Michigan. 511 Detroit Street, Inc. is the operator of the Escape II Bookstore located at 511 Detroit Street, Flint, Michigan. Executive Art Studio, Inc. is the operator of two (2) existing bookstores, the Velvet Touch at 2476-2478 South Dort Highway in Flint, Michigan, and the second at G-4208 Mt. Morris Road in Mt. Morris, Michigan. Petitioner Dequindre Books and News, Inc. is a Michigan corporation organized and duly authorized to do business in the State of Michigan which has, for many years, operated the Tip Top II Bookstore located at 20731 Dequindre in the City of Hazel Park, County of Oakland, State of Michigan. F.P. Books and News, Inc. is also a Michigan corporation which is doing business as the Front Page Book Center at 974 Josyln Road and 822 Baldwin Road, Pontiac, Michigan, and the Front Page News Center at 3091 W. Huron Street, Waterford Township, Michigan.

Petitioners have sold or exhibited at their individual premises various and sundry types of press materials which vary in content from the more sublime, such as "Time" and "Newsweek" to "Playboy," "Penthouse" and "Hustler" magazines. Some of the press materials disseminated by them treat sex and nudity in an honest and forthright manner, some of which may be deemed sexually explicit. In addition, Petitioners offer for sale various and sundry other goods and products to the public. For example, Executive Art Studio, Inc. offers to

the public at its two retail establishments such products as cigarettes, lingerie, candy, jewelry, soaps, novelty items, clothing, perfume and cosmetics, and video tape recorders.

On December 28, 1984, the Governor of the State of Michigan signed into law a new obscenity statute, P.A. 1984, No. 343. (The New Obscenity Statute has been codified as Michigan Compiled Laws Annotated, Sections 752.361 to 753.374.) The newly-adopted statutory scheme, *inter alia*, created a two-tiered approach to what the State of Michigan has characterized as the "'intractable' obscenity problem." While the standard to be applied by the trier of fact in determining whether the press materials *per se* were to be found "obscene" tracked the criteria established by the United States Supreme Court in *Miller* v *California*, 413 US 15 (1973), the statute established a "first degree" and a "second degree" obscenity offense. The "first degree" obscenity offense reads:

> "752.365. First degree obscenity
>
> Sec. 5. (1) A person is guilty of obscenity in the first degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material if dissemination of obscene material is a predominant and regular part of the person's business at a particular theater, store, warehouse, or other establishment and if obscene materials are a principal or substantial part of the stock in trade at that theater, store, warehouse, or other establishment.
>
> (2) Obscenity in the first degree is a misdemeanor, punishable by imprisonment for

not more than 1 year, or by a fine of not more than $100,000.00, or both.

(3) A person who is convicted of a second or subsequent offense under this section is guilty of a misdemeanor and may be imprisoned for not more than 1 year, and shall be fined not less than $50,000.00 and not more than $5,000,000.00. For purposes of this section, an offense is considered a second or subsequent offense if the defendant has previously been convicted under this section or under any similar statute of the United States or any state."

Whereas a second degree obscenity offense reads:

"752.366. Second degree obscenity

Sec. 6. (1) A person is guilty of obscenity in the second degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, to the public any obscene material.

(2) Obscenity in the second degree is a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $5,000.00, or both."

The critical distinction between a "first degree" and a "second degree" obscenity offense is that the former focuses on the *place* of dissemination or exhibition, and the *amount* of suspect material disseminated, as an essential element of the offense, whereas the latter focuses only on the obscenity *vel non* of the materials alleged to be obscene.

In focusing on the place where the offending materials were disseminated, and the amount, a "first degree" obscenity offense establishes, by virtue of the following language, criteria to be applied by the trier of fact:

> ". . . If dissemination of obscene material is a predominant and regular part of the person's business at a particular theater, store, warehouse, or other establishment and if obscene materials are a principal or substantial part of the stock in trade at that theater, store, warehouse, or other establishment."

Upon conviction, for a "first degree" obscenity offense, the offender is subject to monetary penalties far in excess of those authorized for a "second degree" obscenity offense. Further, upon a second or subsequent conviction for a "first degree" obscenity offense, sub-section (3) of MCLA § 752.365 mandates that the guilty person, ". . . shall be fined not less than $50,000.00 nor more than $5,000,000.00," whereas a conviction for a second offense of "second degree obscenity" does not subject the defendant either to a mandatory minimum or to a substantially increased potential monetary penalty.

Approximately three (3) months prior to the effective date of the statute, on January 7, 1985, the Petitioners 511 Detroit Street, Inc. and Executive Art Studio, Inc. filed the instant cause of action in the United States District Court for the Eastern District of Michigan, Southern Division. The Petitioners requested preliminary and permanent injunctive relief as well as a declaratory judgment that Section 5 of P.A. 1984, 343 (MCLA § 752.365) was unconstitutional on its face and repugnant to the *First and Fourteenth Amendments* to the *Constitution of the United States*. This pre-enforcement challenge to the facial validity of the offense of "first degree obscenity" was initiated pursuant to the jurisdiction established in

the Federal Courts by 28 USCA § 1343(3) and 42 USCA § 1983. Specifically, Petitioners claimed that the statutory offense of "first degree obscenity" was void for vagueness, void for overbreadth, and an unlawful prior restraint upon the exercise of Petitioners' *First Amendment* rights, violated the Equal Protection Clause and constituted cruel and unusual punishment, contrary to the *First, Eighth* and *Fourteenth Amendments* to the *Constitution of the United States.*

On March 26, 1985, the District Court, in a *Memorandum Opinion and Order,* struck down, as facially invalid, Section 5 of P.A. 1984, 343 (MCLA § 752.365 *et seq.*) on the grounds that the statute at issue was void for vagueness, void for overbreadth and an unlawful prior restraint. On March 27, 1985, judgment was entered in favor of the Petitioners, and on April 1, 1985, the Attorney General filed a Notice of Appeal.

On March 13, 1985, Petitioners Dequindre Books and News, Inc. and F. P. Books and News, Inc. filed a separate action in the United States District Court for the Eastern District of Michigan, Southern Division, essentially tracking the previously-filed *511 Detroit Street, Inc.* suit. The case was transferred to District Court Judge Stewart A. Newblatt, who issued a *Memorandum Opinion and Order and Judgment,* relying upon the Court's previously-filed Opinion in *511 Detroit St., Inc.* The Attorney General filed a timely Notice of Appeal from the judgment and both cases were consolidated by the Court of Appeals for the Sixth Circuit for purposes of appeal.

On December 17, 1986, a three-judge panel of the United States Court of Appeals for the Sixth Circuit reversed the decision of the District Court and upheld the constitutional validity on its face, of Section 5 of P.A. 1984, 343. The Court held that Section 5 of the statute

was neither void for vagueness nor overbreadth. Further, the Court ruled the unprecedently-high monetary penalty provisions of Section 5 of the statute neither facially overbroad nor an unlawful prior restraint. Finally, the lower court did not respond to Petitioners' claim that MCLA § 752.365 *et seq.* violates the Equal Protection Clause of the *Fourteenth Amendment* to the *Constitution of the United States* nor Petitioners' assertion that the unprecedented and draconian monetary penalty provisions contained therein amounted to cruel and unusual punishment in violation of the *Eighth Amendment* to the *Constitution of the United States.*

REASONS FOR GRANTING THE WRIT

I.

MCLA § 752.365 IS, AS WRITTEN, VOID FOR VAGUENESS AND REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This case presents the important question — and one of first impression — of whether a part of the new Michigan Obscenity Statute, MCLA § 752.365, which statutorily distinguishes between a "first degree" and "second degree" obscenity offense based upon the *place* where the offense occurs and the *amount* of materials found obscene thereon, is void for vagueness and/or overbreadth, constitutes an unlawful prior restraint, violates the Equal Protection Clause or constitutes cruel and unusual punishment, contrary to the *First, Eighth* and *Fourteenth Amendments* to the *Constitution of the United States.*

The starting point for any review of obscenity legislation is *Miller* v *California,* 413 US 15 (1973). In *Miller,* this

Court established new *First Amendment* standards applicable to obscenity prosecutions. The test, which is binding upon the states, was articulated as follows:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."
>
> *Miller* v *California*, 413 US at 24-25.

Though *Miller* v *California, supra*, is the starting point for scrutinizing a statute such as the one at bar, it merely begins the inquiry, for it is not the test determining obscenity *vel non* which is of issue — indeed, the statutory scheme at issue tracks the tripartite test enunciated in *Miller* v *California, supra* — but the two-tiered approach to an obscenity offense and the distinguishing aspects between them. A "first degree" obscenity offense (MCLA § 752.365) focuses on the place where the offense occurs and the amount of material found obscene. The statute reads in pertinent part:

> "MCLA § 752.365(1): A person is guilty of obscenity in the first degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material *if dissemination of obscene material is a predominant and regular part of the person's business* at a particular theater, store, warehouse, or other establishment *and if obscene materials are a principal or substantial part of the stock*

in trade at that theater, store, warehouse, or other establishment." (Emphasis supplied)

It is elementary that in the area of *First Amendment* freedoms, a vague statute or ordinance is repugnant to the constitutional provisions guaranteeing those freedoms. The constitutional requirement of precision and clarity proceeds from the concept that an individual ought to be adequately warned that sanctions will attach to future conduct he might be contemplating, and that such warning may not issue in a form that men of common intelligence must necessarily guess as to its meaning and differ as to its application. *Papachristou* v *City of Jacksonville*, 405 US 156 (1972); *Coates* v *Cincinnati*, 402 US 611 (1971). Aside from the notice requirement, concern over vague criteria arises from the fear of the potential for government abuse and uncertainty of application that is afforded. *Papachristou* v *City of Jacksonville, supra*; *Kolender* v *Lawson*, 461 US 352 (1983).

Stricter standards of precision are required where a regulation is capable of reaching expression protected by the *First Amendment*. *Smith* v *Gougen*, 415 US 566, 572-73 (1974). That is because, as this Court has noted, *First Amendment* freedoms "are delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v *Button*, 371 US 415, 433 (1963).

The fact that P.A. 1984, 343 is an obscenity statute wherein the definition of "obscene" is not claimed to be facially invalid does not insulate a specific section of the statute from judicial scrutiny as to *its* collateral effect on presumptively non-obscene, and thus protected, press materials. Given that a state may enact an obscenity

statute and given that the definition of "obscene" material is not in question, the issue, then, is what effect does MCLA § 752.365 *et seq.* have on non-obscene press materials and what standard is to be applied in a void-for-vagueness context when considering its collateral effect upon press materials not claimed to be obscene. The Court below viewed the issue in a virtual vacuum; indeed, the Court of Appeals never considered the effect such vague statutory language would have on those who disseminate non-obscene press materials. Yet the statute on its face speaks in terms of *where* the press materials at issue are disseminated, *i.e.*, ". . . theater, store, warehouse . . .". Since, therefore, the statute is capable of reaching expression protected by the *First Amendment*, and the place where, and means by which, expressive materials are disseminated to the public, stricter standards of precision are required.

Turning to MCLA § 752.365(1), the Legislature has simply failed to regulate with the requisite "narrow specificity," for the statute fails to establish minimal guidelines to govern law enforcement officials as well as the triers of fact. Nor does the statutory provision at issue draw reasonably clear lines between that which is prohibited and that which is not. The statutory offense at issue thus leaves prosecutors, judges and juries free, "to pursue their personal predilections." *Smith* v *Gougen*, *supra* at 575. Since it ". . .'abut[s] upon sensitive areas of basic *First Amendment* freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' 'Uncertain meanings inevitably lead citizens to steer far wider, of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned* v *City of Rockford*, 408 US 104, 109 (1972).

There simply is no definition of the words, ". . . predominant and regular part of a person's business . . ."

and the words, ". . . principal or substantial part of the stock in trade . . .". Nor is resort to a dictionary helpful, for the definitions of the terms, ". . . predominant and regular . . ." and ". . . substantial or principal . . ." are as vague as the terms being defined. *Webster's Third New International Dictionary* (unabridged, 1969). Thus, the central difficulty is that,

> "This criminal provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard; but rather in the sense that no standard of conduct is specified at all.' . . . Such a provision simply has *no* core . . . ." *Smith* v *Gougen, supra* at 578.

Because the meaning of these words is unclear, MCLA § 752.365(1) does not provide an individual with notice of what he may or may not do. Thus, the operator of a newsstand, bookstore or theatre may be deterred from distributing protected material because that individual may be uncertain whether the dissemination of certain press materials or the amount of those press materials he chooses to offer to the public will subject him to the sanctions spelled out in MCLA § 752.365(2) and (3). The Constitution requires "fair notice or warning" and legislatures must set reasonably clear guidelines for the triers of fact. *Smith* v *Gougen, supra.* MCLA § 752.365 *et seq.* provides neither, and is therefore void for vagueness.

II.

MCLA § 752.365 *ET SEQ.* IS, AS WRITTEN, AN UNDUE AND PROHIBITED BURDEN UPON THE EXERCISE OF FREE SPEECH AND PRESS AND IS VOID FOR OVERBREADTH AND REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

An overbroad statute is one ". . . which does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech or of the press." *Thornhill* v *Alabama*, 310 US 88, 97 (1940). Though aimed at "obscene" materials, that aspect of MCLA § 752.365 *et seq.* which distinguishes it from a second degree obscenity offense — its focus on the place where the offense occurs and the amount — qualitatively and/or quantitatively — of the suspect materials thereon — spills over into the area of constitutionally protected activity and unduly burdens and deters the exercise of protected expression.

The fact that the State of Michigan — consistent with the First Amendment — is permitted to punish the dissemination of obscenity, with proper definitions and procedures, does not mean that the State may, in the name of suppressing obscenity, adopt regulations that will unduly inhibit the circulation of non-obscene books, magazines, films and video tapes. State regulation of obscenity may not be accomplished by provisions that will induce so stringent a self-censorship on the part of those engaged in the circulation of the press that the public's *First Amendment* rights are unduly restricted. If a state statute intended to regulate obscenity has the consequence of inducing booksellers and theatre owners to shun any material with a sexual content, such a statute would be immediately suspect as repugnant to the First

Amendment. Although the Michigan statute purports to define obscenity, all courts recognize that application of the definition to any particular work is a task left to courts and juries, with the outcome difficult to determine in advance.

The problem inherent in any obscenity statute is further amplified because MCLA § 752.365 *et seq.* does not incorporate a scienter element as an essential element of a "first degree" obscenity offense other than as pertains to the press materials themselves. Whereas scienter is an element of the offense in the context of the press materials *per se* — and in this regard there is no difference between a "first degree" and a "second degree" obscenity offense — there is no scienter requirement for that part of the statute which is the critical difference between "first degree" and "second degree" obscenity. Thus, knowledge of the accused as to whether ". . . obscene material(s) is a predominant and regular part of the person's business . . . and . . . are a principal or substantial part of the stock in trade . . ." is not an element of the offense.

Notwithstanding the Circuit Court of Appeals' effort to give MCLA § 752.365 *et seq.* a saving "gloss" by dismembering the definition of "knowledge of content and character" found in MCLA § 752.362(3), into its two component sentences, hold the first to be valid and rule the second invalid but subject to a saving state court construction, it simply failed to deal with the central problem of the statute at issue; the *lack* of a scienter requirement, for on its face, "knowledge of contents and character" refers to the materials *per se, not* to the place where the materials were disseminated or the amount of suspect materials disseminated.

In *Smith* v *California*, 361 US 147 (1959), the Supreme Court held unconstitutional an ordinance which author-

ized the conviction of a bookseller for possession of an allegedly obscene book without proof of *scienter*. The Court stated:

> "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. . . . It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution."

The State of Michigan has merely taken a different branch of the same argument the Supreme Court rejected in *Smith* v *California, supra,* for the distinction between a statute which makes a bookseller criminally liable without knowledge of the *contents* of the press materials on his shelves and one which makes the bookseller criminally liable without any knowledge as to whether the press materials which may be found obscene, ". . . [are] . . . a predominant and regular part of the person's business . . . and . . . are a principal or substantial part of the stock in trade . . ." is a distinction without a difference.

Thus, MCLA § 752.365 *et seq.* ". . . though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." *Smith* v *California, supra.*

III.

MCLA § 752.365 *ET SEQ.* CONSTITUTES AN UNLAWFUL PRIOR RESTRAINT CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Following a final judicial determination in an adversary proceeding that specific books or motion pictures

are obscene, the materials so adjudicated lose their status as speech protected by the *First* and *Fourteenth Amendments* to *The United States Constitution*. However, prior to a final judicial determination that materials are obscene, they retain their status as materials presumptively entitled to constitutional protection as free speech. See, e.g., *Roaden* v *Kentucky*, 413 US 496, 504 (1973) ("the setting of the bookstore or the commercial theatre [is] each presumptively under the protection of the First Amendment . . . .").

In numerous decisions over the past twenty-five years, the United States Supreme Court has emphasized that *First Amendment* considerations pervade the entirety of an obscenity prosecution. This is true whether the proceeding seeking to suppress alleged obscenity is criminal, civil or administrative, and regardless of the label the state may attach to the proceeding. In the area of alleged obscenity, the standards which govern are entirely different from those held applicable to narcotics, gambling paraphernalia, or other contraband. Alleged criminal conduct consisting only of the claimed abuse of free speech must be dealt with differently from any other type of criminal conduct.

Turning to Michigan's statutory scheme, the distinction between a "first degree" and a "second degree" offense — and the potential penalties that may be imposed for a violation thereof — is that a "first degree" offense focuses on the place where the offense occurs and the amount of suspect materials.

Thus, if the trier of fact determines that, ". . . If dissemination of obscene material is a predominant and regular part of the person's business . . . and if obscene materials are a principal or substantial part of the stock in trade . . .", the misdemeanant is subject to potential monetary penalties far in excess of a "second degree"

obscenity offense and, indeed, far in excess of any other criminal offense in the State. It is clear that MCLA § 752.365 *et seq.* is not aimed at the offender *per se* but rather is aimed at the business enterprise from which the press materials were disseminated. By focusing on the place where the offense occurs, MCLA § 752.365 *et seq.* is no different in effect from the numerous efforts by the states to effectuate a closure of a business enterprise because of the sale of an obscene book or the exhibition of an obscene motion picture film. Under the instant statutory scheme, the closure of a bookstore or a theatre is to be effectuated by "bankrupting" the business enterprise by application of penalty provisions of up to One Hundred Thousand ($100,000.00) Dollars upon a first offense and no less than Fifty Thousand ($50,000.00) Dollars nor more than Five Million ($5,000,000.00) Dollars upon the commission of a second offense. (Upon conviction for a second offense, judicial discretion is removed in the setting of the minimum penalty of a fine but not a term of incarceration; " a person who is convicted of a second . . . offense . . . *may* be imprisoned for not more than one year and *shall* be fined not less than $50,000.00 and not more than $5,000,000.00 . . . .").

MCLA § 752.365 *et seq.*, by its terms, authorizes the imposition of patently confiscatory and ruinous financial penalties under the pretext of "punishment." The State is not permitted to employ procedures for suppressing obscenity which, as here, are fraught with the danger of suppressing speech which is not obscene. The Supreme Court has never deviated from these principles. *Brockett* v *Spokane Arcades*, 454 US 1022 (1981); *Vance* v *Universal Amusement Company*, 445 US 308 (1980); *Lo-Ji Sales, Inc.* v *New York*, 442 US 319 (1979); *Heller* v *New York*, 413 US 483 (1973); *Bantam Books* v *Sullivan*, 372 US 58 (1963); *Smith* v *California*, *supra*.

The import of all the foregoing decisions is clear. Legislation, procedures and penalties, permissible as applied to conduct not involving speech are, where directed towards obscenity, subject to the strictest of judicial scrutiny to insure that the dissemination of *protected* speech, even with sexual content, is not unduly restricted.

The prior restraint effect of the criminal fine authorized by MCLA § 752.365 *et seq.* is obvious; a criminal fine of $100,000.00 for the sale of a single obscene book is obviously intended to, and will have the effect of, disabling an individual from continuing in the business of bookselling. That the penalty is intended to have such effect may be deduced from the fact that the maximum fine for a single criminal obscenity violation is 100 times greater than the fine authorized for any other misdemeanor and twenty times greater than for a "second degree" obscenity offense. Furthermore, the authorized fines may be multiplied by cumulation; each book alleged to be obscene may be charged as a separate count. Thus, if a distributor of books and magazines with an inventory of thousands upon thousands of titles is found to have distributed five obscene works, the cumulative fine could be $500,000.00. In addition, a second conviction under MCLA § 752.365 *et seq.* removes all discretion from the sentencing court and mandates a minimum fine of not less than $50,000.00. Thus, if a bookseller is convicted under MCLA § 752.365 *et seq.* of disseminating an obscene magazine, the number of that specific magazine sold, the profits derived therefrom or any other monetary aspect of the specific materials found obscene, is irrelevant to the determination of monetary penalty. The monetary penalty that may be imposed — which may be up to $100,000.00 on a first offense — may therefore — by virtue of the plain wording of the

statute — necessarily include monies derived from the sale or exhibition of press materials, none of which had been judicially found to be obscene at a prior adversary hearing on the issue of their obscenity *vel non* and which are therefore presumptively entitled to the guarantees of the First Amendment.

Although the present case [involving unprecedentedly-high draconian penalties — tantamount to closure orders] is one of first impression, the principles to be followed were outlined by the United States Supreme Court a half-century ago in the landmark case of *Near* v *Minnesota*, 283 US 697 (1931). In *Near, supra*, the Court struck down a Minnesota libel statute that had been used to authorize an injunction against future libelous publications imposed against a newspaper found to have published libels on nine separate occasions. In language apposite to the unprecedented fines authorized by the statute at issue, the Supreme Court stated:

> "*The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical.* The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression of the evils of scandal.'"
>
> *Id.* at 711, 51 S Ct at 629. (Emphasis added)

The *purpose* behind MCLA § 752.365 *et seq.* is no doubt the same as that which supported the libel law stricken in *Near*. Just as Minnesota legislators feared "that prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression of the evils of scandal'" (*id.*), similarly, the Michigan legislators no doubt felt great frustration with the failure of traditional criminal punishments to remove sexually oriented material deemed "offensive" from bookstores and theatres.

The rationale purportedly justifying MCLA § 752.365 *et seq.* is found in the legislative history, which reads:

> "The bill would provide for fines for the dissemination of obscene material that reflect the billions of dollars at stake in the pornography business. Imposition of a fine of a few thousand dollars on an entrepreneur who may be making millions each year is only a slap on the wrist. The best way to curtail dissemination of pornography is to make it unprofitable, hence the bill's provisions for fines of up to $5 million."
>
> Attorney General's Ex. A82.

The problem with this approach, as outlined in *Near, supra,* is that such attempts to suppress *future* unprotected speech by heavy-handed and exorbitant financial penalties for past violations create an undue prior restraint upon protected speech.

By authorizing criminal fines above and beyond the sanctions available for offenses the State deems to be of comparable magnitude, MCLA § 752.365 *et seq.* reveals, on its face, that its purpose is not "punishment in the traditional sense" but the deterrence of future speech which is presumptively protected by the *First Amendment*. As such, it is no less repugnant to the Constitution than the libel statute stricken in *Near, supra.*

IV.

MCLA § 752.365 *ET SEQ.* IS REPUGNANT TO THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, FOR ITS OPERATION AND EFFECT IS TO ESTABLISH DIFFERENTIAL TREATMENT OF THE PRESS ABSENT A STATE INTEREST OF COMPELLING IMPORTANCE.

This Court has repeatedly and consistently emphasized that the line between protected and unprotected speech is "finely drawn" and requires the use of "sensitive tools" to discern and enforce that boundary. *Speiser* v *Randall*, 357 US 513, 525 (1958); *Bantam Books* v *Sullivan*, 372 US 58, 66 (1963). Yet the bookseller, the newsdealer and the theatre operator are placed in a potentially ruinous position by the threatened imposition of fines called for by MCLA § 752.365 *et seq.*.

In addition, one convicted of violating MCLA § 752.365 *et seq.* is treated differently under the law of the State of Michigan than any other misdemeanant where no penalty is specified by the statute (MCLA § 750.504). Where a penalty for the commission of a misdemeanor is specified in the body of the statute itself, no penalty provisions approach the potentially ruinous fines embodied in MCLA § 752.365(2) and (3). Nor, upon conviction for a second offense does any statute of the State defining an offense as a "misdemeanor" *mandate* a minimum fine, let alone require same to be no less than Fifty Thousand ($50,000.00) Dollars.

Not only is a newsdealer or theatre operator treated differently than any other misdemeanant, he is also accorded disparate treatment by MCLA § 752.365 *et seq.* itself; *only* the newsstand dealer or the movie theatre operator are subject to the provisions of MCLA § 752.365

et seq., for theirs is a business dealing primarily in the dissemination of press materials. Thus, the operator of a drugstore selling magazines or the operator of an appliance store which has a video tape rental library would never be charged with a first degree obscenity offense since the dissemination of press materials constitutes a limited amount of their "business" and "stock in trade." They would therefore be insulated from prosecution under MCLA § 752.365 *et seq.* even though they disseminated and were charged criminally with distributing the same book, magazine, film or video tape as one who deals primarily in the dissemination of press materials.

Recently, this Court struck down Minnesota's ink and paper tax in a case styled, *Minneapolis Star* v *Minnesota Comm. of Rev.*, 460 US 575 (1983), on the grounds that the State had created a special use tax which effectively singled out the press for special treatment.

Petitioners respectfully submit that there is no principled difference between the imposition of a "tax" or the imposition of a "fine." Thus, unless the State comes forward and ". . . asserts a counterbalancing interest of compelling importance that it cannot achieve without differential . . . [treatment by means of grossly disproportionate penalty provisions] . . .", MCLA § 752.365 *et seq.* is unconstitutional. *Minneapolis Star* v *Minnesota Comm. of Rev., supra.*

Assuming that Michigan has an important interest in suppressing unprotected obscenity, the question remains whether it may fine a disseminator of obscenity so disproportionately in relation to all other criminal offenses, even those that Michigan itself classifies as more serious. No reason suggests itself for the disparity in treatment. Certainly there can be no showing that the wealth of persons and companies potentially subject to these fines is any greater than the wealth of persons and companies

who are potential violators of the multitude of white-collar or industrial crimes punished by the State of Michigan.

To reiterate, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star* v *Minnesota Comm. of Rev., supra.* No such reasoned basis for differential treatment suggests itself, nor has the State asserted any legitimate — let alone compelling — state interest. MCLA § 752.365 *et seq.* is, therefore, repugnant to the Equal Protection Clause of the Fourteenth Amendment to the *Constitution of the United States.*

CONCLUSION

For the above-stated reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

By: /s/ STEPHEN M. TAYLOR

STEPHEN M. TAYLOR, P.C.
20100 Civic Center Drive, Suite 300
Southfield, MI 48076
(313) 358-3590

Attorney for Petitioners

Dated: April 8, 1987

APPENDICES

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APPENDIX A

OPINION

511 DETROIT STREET, INC. v. KELLEY
Cite as 807 F.2d 1293 (6th Cir. 1986)

(United States Court of Appeals for the Sixth Circuit)

(Argued June 12, 1986)
(Decided December 17, 1986)

(511 DETROIT STREET, INC., and Executive Art Studios, Inc., Plaintiffs-Appellees, v. Frank J. KELLEY, in his official capacity as Attorney General, State of Michigan, (85-1279), Defendant-Appellant; DEQUINDRE BOOKS AND NEWS, INC., and F.P. Books and News, Inc., Plaintiffs-Appellees, v. Hon. Frank J. KELLEY, in his official capacity as Attorney General, State of Michigan, (85-1642) and L. Brooks Patterson, in his official capacity as Prosecuting Attorney of the County of Oakland, State of Michigan, (85-1622), Defendants-Appellants — Nos. 85-1279, 85-1622 and 85-1642)

Establishment owners brought action seeking order declaring portion of Michigan's antiobscenity law unconstitutional on its face and enjoining enforcement of such law. The United States District Court, Eastern District of Michigan, Stewart A. Newblatt, J., held that portion of Michigan's antiobscenity law was unconstitutional. Michigan State Attorney General and county attorney appealed. The Court of Appeals, Boggs, Circuit Judge, held that: (1) challenged portion of Michigan's antiobscenity law was not void-for-vagueness; (2) it could not be said with certainty that language in law, which might be overbroad, was not

fairly subject to constitutional interpretation by the Michigan courts; and (3) obscenity law was not impermissible prior restraint on expression.

Reversed and remanded.

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1. ***Constitutional Law*** ☞***90.1(1)***
   Criminal Law ☞***13.1(1)***

   The void-for-vagueness doctrine requires that penal statute define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement; and, where statute's literal scope, unaided by narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, doctrine demands greater degree of specificity than in other contexts. U.S.C.A. Const.Amend. 1.

2. ***Constitutional Law*** ☞***90.4(1)***

   The greater degree of specificity, which is required of statutes capable of reaching expression sheltered by the First Amendment, was not required of portion of Michigan's antiobscenity statute, which was challenged on grounds of vagueness, where vagueness in challenged language affected only level of crime with which actor might be charged, rather than type of expression proscribed by the statute; definition of obscenity was not attacked, but rather definitions of predominant, regular, business, principal, substantial, and stock in trade were attacked. M.C.L.A. § 752.365.

3. ***Obscenity*** ☞***2.5***

   Michigan's first-degree obscenity law, which made person guilty of first-degree obscenity if dissemination of obscene materials was predominant and regular part of person's business and if obscene materials were principal or substantial part of stock in trade of person's business, was not unconstitutionally vague, where challenged terms were used throughout the civil and criminal code and in reported cases and where nature of the distinction between first-degree obscenity offense and unchallenged second-degree obscenity offense minimized likelihood of arbitrary or discriminatory enforcement. M.C.L.A. §§ 752.365, 752.366.

4. ***Criminal Law*** ☞***986.2(1)***

   Fact that sentencing judge in obscenity prosecution may consider bookseller's total profits in determining what level of fine to impose did

not mean that bookseller could be punished for sales of protected, nonobscene material; sentencing judges often consider defendant's ability to pay.

5. Constitutional Law ☞46(1)

Court of Appeals declined to determine facial constitutionality of Michigan obscenity statute challenged as overbroad based on nature of statute's scienter requirement, where court could not say with certainty that language, which appeared to set up presumption that one who knows or is aware that material depicts or describes sexual conduct is also aware of the nature and character of the entire item, was not fairly subject to constitutional interpretation by the Michigan courts. M.C.L.A. §§ 752.362, 752.365.

6. Constitutional Law ☞90.4(1)
Obscenity ☞2.5

Michigan obscenity statute, which threatened large fines of up to $5 million that could impair the operation of business enterprise, was not impermissible prior restraint on expression, even where that business enterprise also involved dissemination of protected materials; fact that enterprise did some business disseminating protected materials could not immunize that enterprise from large fines that may be imposed for violation of criminal law. M.C.L.A. § 752.365.

Steven M. Taylor (argued), Southfield, Mich., for plaintiffs-appellees; George H. Weller (argued), Asst. Atty. Gen., Louis J. Caruso, Sol. Gen., Lansing, Mich., Allen M. Wolf, Asst. Pros. Atty., Richard H. Browne (argued), Pontiac, Mich., for defendants-appellants.

*Before KRUPANSKY and BOGGS, Circuit Judges, and PORTER, Senior District Judge.**

BOGGS, Circuit Judge.

Defendants-appellants appeal from an order of District Judge Stewart A. Newblatt of the Eastern District of Michigan ruling that a portion of Michigan's anti-

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* *The Honorable David S. Porter, United States Senior District Judge for the Southern District of Ohio, sitting by designation.*

obscenity law is unconstitutionally vague and overbroad and that it acts as an impermissible restraint on protected speech. For the reasons set forth below, we reverse and remand.

I.

The 1984 Michigan anti-obscenity law, Act 343 of 1984, was to become effective on March 29, 1985. The law includes a provision, Section 6, which provides that —

> [a] person is guilty of obscenity in the second degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, to the public any obscene material.

Obscenity in the second degree is a misdemeanor, punishable by up to one year in prison and/or up to a $5000 fine. Plaintiffs-appellees ("plaintiffs") have not contested this section.

The law also includes a provision, Section 5, which is the subject of this lawsuit. That section provides that —

> [a] person is guilty of obscenity in the first degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material if dissemination of obscene material is a predominant and regular part of the person's business at a particular theatre, store, warehouse, or other establishment and if obscene materials are a principal part or substantial part of the stock in trade at that theatre, store, warehouse, or other establishment.

A first offense of obscenity in the first degree is punishable by up to one year in prison and/or up to a $100,000 fine; a second or subsequent offense is punishable by up

to one year in prison and a mandatory fine of $50,000 to $5,000,000.[1]

Shortly before the law was to become effective, the owners of three establishments in Genesee County, Michigan, filed suit in federal district court seeking a final order declaring Section 5 unconstitutional on its face and enjoining defendants from enforcing it against them. The district court consolidated the trial of the action on the merits with the hearing of plaintiffs' motion for a preliminary injunction; declared Section 5 to be overbroad, vague, and a prior restraint; and enjoined the Michigan Attorney General and the Genesee County prosecutor from enforcing it.

Meanwhile, the owners of several establishments in Oakland County, Michigan, had filed a similar suit seeking similar relief with respect to Section 5. *Dequindre Books* v. *Kelley*, No. 85-71115 (E.D. Mich). District Judge Newblatt adopted his opinion in *511 Detroit Street* as his opinion in that case as well. Defendants appeal to this Court from the decisions in both cases, which have been consolidated for purposes of this appeal.[2]

II.

[1] Plaintiffs argued, and the district court agreed, that Section 5 is unconstitutionally vague. The void-for-vagueness doctrine requires that a penal statute define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited

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[1] A conviction under Section 5 will be considered a subsequent offense if the defendant has been convicted under Section 5 or under any similar statute of the United States or of any state.

[2] Defendants argue that the District Court should have abstained from decision until Section 5 was authoritatively interpreted by the Michigan courts. Had the District Court been correct in its substantive ruling, abstention would have been inappropriate.

and in a manner that does not encourage arbitrary and discriminatory enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); and "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974).

[2] We look first at whether this is a situation that reaches expression sheltered by the first amendment to the extent that this Court is required, under *Smith* v. *Goguen*, to demand of the statute a greater degree of specificity than we would demand in other contexts. We note that plaintiffs have not attacked, on void-for-vagueness grounds, the definition of obscenity but, rather, have attacked the terms "predominant," "regular," "business," "principal," "substantial," and "stock in trade," as used in Section 5. Put another way, plaintiffs do not appear to have a problem determining when their conduct is criminal, but they complain that they cannot determine with sufficient precision just how criminal it is. Any vagueness in the challenged language affects only the level of crime with which an actor might be charged, but does not affect the type of expression proscribed by the act. Therefore, in light of the narrowness of this challenge, we do not require of the language the greater degree of specificity demanded in a first amendment context. *Cf. Smith* v. *Goguen*, *supra*.

Looking now to the general requirements under the void-for-vagueness doctrine, we must determine whether Section 5 defines the criminal conduct with sufficient definiteness that ordinary people can understand what conduct is prohibited. *See Kolender* v. *Lawson*, *supra*. Plaintiffs' specific complaint about Section 5 appears to

revolve around the use of the words "predominant," "regular," "business," "principal," "substantial," "and "stock in trade." The essence of this complaint seems to be that they do not know the *basis* upon which "predominant," "regular," "principal," "substantial," or "stock in trade" will be determined; they inquire rhetorically whether they will be determined on the basis of the establishment's dollar volume, shelf or floor space, or the number of articles sold, and will they be determined on the basis of the past year, month, day, hour, or ten minutes?

[3] Under *Kolender*, we must decide this issue by reference to how ordinary people are likely to understand the terms. Plaintiffs illustrate their concern by arguing that state officials could enter a newsstand, purchase all non-obscene materials, no matter how voluminous, then arrest and convict the owners for a violation of Section 5, based solely on the remaining material. One is immediately struck that this is an absurd result, but that leads us to reject the example, not the statute. We do not believe that this example is within the scope of Section 5 as ordinary people would understand it: We cannot imagine that a jury of ordinary people would find, under those circumstances, that "dissemination of obscene material is a predominant and regular part of [that] person's business . . . and . . . a principal part or substantial part of the stock in trade at that . . . establishment." A case that would be less clear would be where the state could show that most of the dollar-volume of an establishment was the result of disseminating obscene materials used only a small proportion of the floor space at the establishment and that the majority of sales transactions involved only non-obscene materials. However, the fact that there are cases near the margin where it is difficult to draw the line does not make a statute unconstitutional, *National Mobilization Committee to*

End War in Viet Nam v. *Foran*, 411 F.2d 934, 939 (7th Cir. 1969), particularly where the margin in question is not that between criminal and non-criminal conduct but is, as here, that between degrees of criminal conduct. Furthermore, the challenged terms are found throughout civil and criminal codes, and throughout reported cases. *See, e.g.*, 18 U.S.C. §§ 245 ("substantial"), 1954 ("regular"); 26 U.S.C. §§ 48, 831(b) ("predominant"), 1221 ("stock in trade"); *Acro Mfg. Co.* v. *C.I.R.*, 334 F.2d 40, 43 (6th Cir. 1964) ("stock in trade").

Under the void-for vagueness doctrine, a criminal statute must also describe the proscribed conduct in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender* v. *Lawson, supra* (there the Court invalidated a state statute making it a crime to fail to produce "credible and reliable" identification when requested by a police officer). Again we note that plaintiffs do not challenge, on void-for-vagueness grounds, the language defining "obscenity," language also contained in Section 6. Therefore, any act against which state authorities might enforce Section 5 (because they believe that the person has committed obscenity in the first degree) would necessarily also be a violation of Section 6 (obscenity in the second degree). Thus, the void-for-vagueness challenge here must be that the language distinguishing between Sections 5 and 6 is so vague as to encourage enforcement officials to charge a Section 5 violation as well as a Section 6 violation for arbitrary, nonstatutory reasons.

First, as we discussed above, the terms of the statute are found throughout the law and are within the understanding ordinary people. Furthermore, the nature of the distinction between Sections 5 and 6 minimizes the likelihood of arbitrary or discriminitory enforcement. The distinction between the punishments under the two

sections is that one convicted under Section 5 may be required to pay much higher fines than one convicted under Section 6; however, we note that each section provides for up to one year in prison, which minimizes the difference between the detrimental effects of the two sections and likewise minimizes the potential for arbitrary and discriminatory enforcement. This is clearly not a situation, such as that in *Kolender*, where a statute is likely to be enforced at the "whim" of the enforcement official. Here, an enforcement official seeking to enforce Section 5 must prove all the elements of Section 6, a crime providing for up to one year in prison, in addition to proving the additional elements of Section 5. We hold that this does not encourage arbitrary or discriminatory enforcement of Section 5.

III.

Plaintiffs also contended, and the district court agreed, that Section 5 was unconstitutionally overbroad, primarily because of the nature of the scienter requirement. The district court additionally concluded that Section 5 was overbroad because the bookseller might be punished for disseminating protected material, presumably because a judge may consider a business's total profits when determining what level of fine to impose. Jt.App. at 32.

[4] First, we reject the notion that a bookseller may be punished for sales of protected, non-obscene material because a sentencing judge may consider the business's total profits. "Sentencing judges may, and often do, consider the defendant's ability to pay . . . ." *San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1, 22, 93 S.Ct. 1278, 1290, 36 L.Ed.2d 16 (1973); *see also Bearden* v. *Georgia*, 461 U.S. 660, 670, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983) ("the sentencing court can consider the entire back-

ground of the defendant, including his employment history and financial resources").

Next, we examine whether the scienter requirement applicable to Section 5 is constitutionally adequate. The Supreme Court held in *Smith* v. *California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), that a statute making it a criminal offense to possess obscene material must contain *some* scienter requirement (the statute there imposed *strict liability*, without regard for knowledge, upon one possessing obscene material). The Court there was concerned that the statute would tend to restrict the public's access to books because of "[t]he limitation in the amount of reading material with which [a bookseller] could familiarize himself, and his timidity in the face of his absolute criminal liability." *Id.* 361 U.S. at 153-54, 80 S.Ct. at 219. However, the court also expressly reserved judgment on what sort of mental element would be required. *Id.* at 154, 80 S.Ct. 219.

In a later case, the Supreme Court upheld a New York State obscenity statute that, by its terms, required no knowledge of the material and which included a presumption that possession by any person of six or more identical or similar obscene articles had violated the law. *Mishkin* v. *New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966). However, the court relied, in its holding, on the statutory construction of the law by state courts, which construed the law to apply only to "those who are in some manner aware of the *character* of the material they attempt to distribute." *Id.* at 510, 86 S.Ct. at 964 (emphasis supplied by Court in *Mishkin*). Beyond the Supreme Court's holding that the particular, judicially-created scienter requirement was constitutional, the Court again declined to define "what sort of mental element is requisite to a constitutionally permissible prosecution." *Id.* at 511, 86 S.Ct. at 964-65 (quoting *Smith*, 361 U.S. at 154, 80 S.Ct. at 219).

[5] Here Section 5, by its terms, applies only to one who knows "the content and character of the material." That knowledge is defined in Section 2 of the law as —

> having general knowledge or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, of the nature and character of the material involved. A person has such knowledge when he or she knows or is aware that the material contains, depicts, or describes sexual conduct whether or not such person has precise knowledge of the specific contents of the material.

The first sentence of Section 2 is very close to the limiting language, as construed in the state courts, that the Supreme Court held in *Mishkin* was constitutionally permissible, where the statute, as construed, applied only to —

> those who are in some manner aware of the *character* of the material

Mishkin, 383 U.S. at 510, 86 S.Ct. at 964 (emphasis supplied by Court in *Mishkin*). Thus, we find no constitutional infirmity in the first sentence of Section 2.

We are troubled, however, by the second sentence of Section 2. That sentence provides that one has the knowledge described in the first sentence of Section 2 —

> when he or she knows or is aware that the material contains, depicts, or describes sexual conduct whether or not such person has precise knowledge of the specific contents of the material.

This language appears to set up a presumption that one who knows or is aware that material depicts or describes sexual conduct is also aware of the nature and character of the entire item. The effect of such a presumption

would be to require a bookseller personally to inspect, in its entirety, any material that he or she has reason to believe depicts or describes sexual conduct (which may be protected material), to determine whether or not it is obscene. Such an inquiry strongly resembles that from which the Supreme Court, in *Smith*, sought to protect booksellers.[3]

Federal courts, however, are reluctant to declare a state statute to be facially unconstitutional, without the benefit of a state court's construction of the statute, where the statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harman* v. *Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965); *see also Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941). The *Mishkin* case, cited above, contains an example of a state statute that benefited from a state-court interpretation. The statute there, like that in *Smith*, had no express scienter requirement; however, the New York Court of Appeals read the statute to apply only to one who is in some manner aware of the character of the material. *People* v. *Finkelstein*, 9 N.Y.2d 342, 344-45, 214 N.Y.S2d 363, 364-65, 174 N.E.2d 470, 471 (1961). The U.S. Supreme Court relied on that interpretation in finding the statute constitutional. 383 U.S. at 510, 86 S.Ct. at 964. In light of this example, we cannot say with certainty that the sentence here in question is not fairly subject to a constitutional interpretation by the Michigan

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[3] A similar presumption in a Texas statute was struck down in *Davis* v. *State*, 658 S.W.2d 572 (Tex.Crim.App. 1983). There, the statute had presumed that one "who promotes or wholesale promotes obscene material . . . or possesses the same with intent to promote or wholesale promote it in the course of his business" had knowledge of the content and character of the material. V.T.C.A., Penal Code, § 43.23(e).

courts. Accordingly, we decline to determine the facial constitutionality of this language in advance of its application and construction by the Michigan courts.

IV.

[6] Finally, plaintiffs argued, and the district court agreed, that Section 5 acts as an unconstitutional prior restraint on expression because of the very large fines provided in the statute. The district court reasoned that the very large fines make the statute the equivalent of an unconstitutional padlocking or closure law, *see, e.g., Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), because, the district court concluded, the statute is designed to close down the commercial enterprises described in Section 5. In support of that conclusion, the district court cited the following portion of the legislative analysis of the enrolled bill:

> The bill would provide for fines for the dissemination of obscene material that reflect the billions of dollars at stake in the pornography business. Imposition of a fine of a few thousand dollars on an entrepreneur who may be making millions each year is only a slap on the wrist. The best way to curtail dissemination of pornography is to make it unprofitable, hence the bill's provisions for fines of up to $5 million.

Jt.App. at 30-31. Furthermore, the district court concluded that because a sentencing judge may look at total profits, from sales of both projected and obscene materials, in determining the appropriate fine under Section 5, *protected* material will be "penalized," for there will be no judicial determination of just how much of the total profits was derived from dissemination of *obscene* material.

We reject this contention. We refuse to hold that a statute threatening fines that could impair the operation of a business is an impermissible prior restraint on expression, even where that business also involves dissemination of protected materials. The fact that a person does some business disseminating protected materials cannot immunize that person from large fines that may be imposed for violation of criminal law. *See Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178, 184, 66 S.Ct. 511, 514, 90 L.Ed. 607 (1946); *Associated Press* v. *Labor Board*, 301 U.S. 103, 132-33, 57 S.Ct. 650, 655-56, 81 L.Ed. 953 (1937); *Sun Pub. Co.* v. *Walling*, 140 F.2d 445, 447 (6th Cir.), *cert. denied*, 322 U.S. 728, 64 S.Ct. 946, 88 L.Ed. 1564 (1944). Furthermore, as we indicated above, the financial condition of a defendant is an appropriate factor for a sentencing judge to consider when determining the appropriate fine to levy, and we find no case law to support the notion that a fine for illegal activity cannot be paid from lawfully obtained money, even where that lawfully obtained money is the result of disseminating protected expression.

City of Paducah v. *Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir. 1986) is not to the contrary. There this Court struck down a statute which revoked all licenses for businesses violating an obscenity ordinance, holding that it would control all future expression by the offending businesses. *Id.* at 470. Here, by contrast, there is no prospective legal restraint on any expression, obscene or protected, that violators of either Section 5 or Section 6 may choose to undertake.

We simply find no basis for a conclusion that Section 5, large fines and all, constitutes a prior restraint on protected expression. Accordingly, we REVERSE and REMAND to the district court for proceedings consistent with this opinion.

APPENDIX B

JUDGMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated March 27, 1985)

(511 DETROIT STREET, INC., et al, Plaintiffs, v FRANK J. KELLEY, et al, Defendants — CIVIL ACTION NO: 85-40006)

The parties having consented to consolidation of the hearing for preliminary injunction with trial on the merits pursuant to FR Civ P 65(a)(2) and the Court having found that Section 5 of Public Act 343 is unconstitutionally vague and overbroad and that it acts as an impermissible prior restraint on protected speech;

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered for plaintiff.

ROBERT A. MOSSING, CLERK
BY: /s/ Ruth A. Jozwiak,
Deputy Clerk

Dated: March 27, 1985

TO: Steven M. Taylor, 20100 Civic Center Drive, Suite 300, Southfield, MI 48076; Donald Kuebler, Assist. Prosecuting Atty., 100 Courthouse, Flint, MI 48502; George H. Weller, Assist. Atty. General, 793 Law Bldg., 525 W. Ottawa, Lansing, MI 48913; Martin L. Kotch, 130 E. Elizabeth St., Detroit, MI 48201.

B-2

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan — Southern Division – Flint)

(Filed March 25, 1985)

Plaintiffs filed their complaint in this case on January 7, 1985 seeking a final order declaring Section 5 of Enrolled Senate Bill No. 899, also known as 1984 Public Act 343, unconstitutional on its face and enjoining defendants from enforcing Section 5 against plaintiffs. The parties having so agreed, the Court ordered the trial of the action on the merits consolidated with the hearing on plaintiffs' motion for preliminary injunction, pursuant to Fed. R. Civ. P. 65(a)(2). The American Civil Liberties Union was permitted to file a brief amicus curiae. All of the parties have exchanged briefs and supplementary briefs, and this case is now ready for decision.

Bill No. 899 (a copy is appended to this opinion) was enacted in order "to define and prohibit the possession or dissemination of obscene material under certain circumstances; to prohibit conduct related thereto; [and] to provide penalties . . ." Preamble to Bill No. 899. It is divided into fourteen sections. Plaintiffs, however, object only to Section 5, which reads:

> (1) A person is guilty of obscenity in the first degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material if dissemination of obscene material is a predominant and regular part of the person's business at a particular theater, store, warehouse, or other establishment and if obscene materials are a principal or substantial part

of the stock in trade at that theatre, store, warehouse, or other establishment.

(2) Obscenity in the first degree is a misdemeanor, punishable by imprisonment for not more [*than*] one year, or by a fine of not more than $100,000.00 or both.

(3) A person who is convicted of a second or subsequent offense under this section is guilty of a misdemeanor and may be imprisoned for not more than 1 year, and shall be fined not less than $50,000.00 and not more than $5,000,000.00. For purposes of this section, an offense is considered a second or subsequent offense if the defendant has previously been convicted under this section or under any similar statute of the United States or any state.

Section 5, they argue, is repugnant to the free speech and free press provisions of the First and Fourteenth Amendments because its wording is vague and overbroad, it places a burden upon the dissemination of protected expression and constitutes a prior restraint and it creates a content-based statutory classification without a compelling state interest. Furthermore, its penalty provisions are so disproportionate as to constitute cruel and unusual punishment.

At the outset, the Court would like to compliment plaintiffs' attorneys on the high professional quality of their presentation and argument of the issues. Because the ultimate conclusion reached is, as plaintiffs claim, that Section 5 is vague and overbroad and acts as a prior restraint of protected speech, this opinion will merely paraphrase the points appropriately made by plaintiffs. To do otherwise would unnecessarily deplete the

Court's most valuable asset — time — and merely cater unnecessarily to the writer's ego.

Before dealing with the substance of plaintiffs' motion, a few preliminary matters should be addressed. The Court notes that there is a genuine case or controversy between the parties and that plaintiffs have standing to challenge the constitutionality of Section 5. The question to be asked in determining if a case or controversy exists pursuant to the Declaratory Judgments Act, 28 USC § 2201, is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v *Pacific Coal & Oil Co.*, 312 US 270, 273 (1941). The conflict here is clear. The State and County intend to enforce Section 5 when it becomes effective on March 29, 1985. Plaintiffs, on the other hand, claim that they are unable to conform their behavior to the statutory requirements because they do not understand the meanings of the words "predominant," "regular," "business," "principal," "substantial," and "stock," as used in the bill.

Each Plaintiff is most certainly "a proper party to request an adjudication of [the constitutionality of Section 5]." *Flast* v *Cohen*, 392 US 83, 100 (1968). The threat of possible enforcement of a statute incomprehensible to individuals of ordinary intelligence against plaintiffs, who never deny that some of their retailed items may be obscene, effectively "chills" their right to disseminate protected materials.

Because of the determination herein that Section 5 is unconstitutional on its face, it is unnecessary to address plaintiffs' Eighth Amendment claim. Moreover, a claim that the penalty scheme of Section 5 constitutes cruel and unusual punishment is premature in this action

where prosecution has not been undertaken and there is no sentence to be reviewed.

Although the Attorney General has not pushed this Court to abstain [Tr. of Hearing at 30-31], the County Prosecutor argues that it is improper to address the constitutional validity of a state criminal law in this forum. Such an argument has not persuaded the United States Supreme Court in its consideration of preenforcement anticipatory challenges of state obscenity abatement statutes. *Brockett* v *Spokane Arcades, Inc.*, 454 US 1022 (1981), *affirming Spokane Arcades, Inc.* v *Brockett*, 631 F2d 135 (CA 9, 1980); *Vance* v *Universal Amusement Co.*, 445 US 308 (1980). The Prosecutor has made no attempt to explain how resolution by a Michigan court could obviate the need to address the federal constitutional issues raised by plaintiffs. *See Hawaii Housing Authority* v *Midkiff*, 81 L Ed 2d 186, 194-95 (1984). Therefore, this Court shall not abstain.

VAGUENESS AND OVERBREADTH

In plain and simple language, plaintiffs' vagueness argument is "that they really do not know, based upon the vague language of the statute, as to where they fall. Do they fall within the purview of the statute or assuming that they are at that line, how do they extricate themselves from the draconian penalty provisions by coming outside or falling outside the purview of that statute? Tr. at 16. At a minimum, due process requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v *Lawson*, 461 US 352, 357 (1983). "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expres-

sion sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith* v *Hoguen*, 415 US 566, 573 (1974).

Section 5 is clearly "capable of reaching expression sheltered by the First Amendment" because it, like Section 6,[1] makes criminal the dissemination of obscene material "if dissemination of obscene material is a predominant and regular part of the person's business . . ." "Material," as defined in Section 2(4), encompasses presumptively protected speech, "including but not limited to anything printed or written, any book, magazine, newspaper, pamphlet, picture, drawing, pictorial representation, motion picture, photograph, video tape, video disk, film, transparency, slide, or any other medium used to electronically produce or reproduce images on a screen, or any mechanical, chemical, or electronic reproduction . . ." Such utterances are protected by the First Amendment until established to be obscene. *Kaplan* v *California*, 413 US 115, 119-20 (1973).

Specifically, plaintiffs argue that Section 5 does not explain what a "predominant and regular part of [a] person's business" and a "principal or substantial part of the stock in trade" mean. Does "predominant and regular" refer to the percentage of press materials offered for sale or does it mean a percentage of the total sales of the business, both press and non-press items? Does "business" refer to gross sales or to the kinds of material offered for sale? Since "principal" and "substantial" are in the disjunctive, how are they distinguished and what does each signify? What is "stock in trade" and when is it measured?

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[1] Plaintiffs do not challenge the validity of Section 6, which makes knowing dissemination of obscenity a misdemeanor, punishable by up to one year in prison and/or a fine of $5,000.

In an attempt to clarify the challenged wording, the Attorney General cites MCLA 8.3a which requires that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . ." The Attorney General then attempts to give meaning to Section 5 by quoting dictionary definitions, which, even when considered in the context of an anti-obscenity statute, are no less obscure than the statutory language they attempt to explain. Finally, the State proposes that "substantial," as contemplated by Section 5, means over 50%. Apparently, the 50% figure has been reached by reading a California state case which interpreted "substantial portion of the total presentation time" to mean "a preponderance of the total number of the films exhibited are adult films." *Strand Property Corp.* v *Municipal Court*, 148 Cal App 3d 882, 889; 200 Cal Rptr 47, 51 (1983). Nothing in the legislative history suggests that the drafters of PA 343 intended "substantial" to mean 50% plus.

At oral argument, the Attorney General was uncertain whether the 50% would apply to the number of retail items or to 50% of the retail dollar value. The 50% figure might also apply to the total number of pages of press material available for dissemination. (Tr. 34-35) The Attorney General was also unable to set a point in time when the 50% plus determination would be made. (Tr. 40-43) Thus, the 50% could vary from moment to moment throughout the day as materials are purchased and the shelves are restocked.

The inability of the State to give any but a very foggy explanation of the practical application of Section 5 only strengthens plaintiffs' argument that it is vague. Even taking the Attorney General's dictionary definitions and his 50% standard, there are absolutely no guidelines set for conforming to statutorily approved behavior. Plain-

tiffs are not told what 50% of their stock and trade is comprised of. Does it include speech as well as non-speech items? Nor are they informed over what period of time the stock in trade will be measured. Presumably the local gendarme could enter a "suspect" establishment at any time, buy up the remaining copies of *Time*, and charge the proprietor with a Section 5 violation for his next sale of an obscene magazine. Of course, this hazy construction is merely the Attorney General's suggested interpretation, and it cannot be found from reading the act itself which is even more ambiguous. Furthermore, there is no protection against the arbitrary prosecutor.

The County Prosecutor takes great pride in one of the alleged safeguards of PA 343: Section 11(1) permits "[a] person intending to possess material for dissemination or intending to disseminate material that may be considered obscene [to] request, from the attorney general or from the prosecuting attorney of the county in which the dissemination is intended, an advisory opinion as to the legality of the possession or dissemination." Of course, Section 11 is of no assistance to plaintiffs who do not argue that they do not understand the definition of obscenity, but rather, assert that they have no idea what comprises a "predominant and regular part of [a] person's business" or a "principal or substantial part of the stock in trade." Section 5 is void for vagueness.

Logically related to the doctrine of vagueness is the doctrine of overbreadth. *Kolender* v *Lawson*, 461 US 352, 359 n 8 (1983). The reach of Section 5 is so broad that it not only deters those who would "major in obscenity," to quote the Attorney General, but it chills the First Amendment rights of those who would disseminate protected materials of a sexual nature.

Despite the Attorney General's attempt to establish a scienter requirement for "predominant and regular . . ." and "substantial or principal . . . ," (Tr. 45-46) no reading of the act requires a scienter element in addition to knowledge of the possession of obscene material. A Section 5 offense, as distinguished from one under Section 6 which focuses solely on the material disseminated, is determined by looking at the *place* from which materials are distributed, i.e., "theater, store, warehouse, or other establishment." By concentrating on the *place*, Section 5 necessarily poses a greater threat to establishments such as bookstores and theaters, which sell and exhibit presumptively protected materials, because those businesses are more likely to have a substantial amount of materials which may be found obscene. The Attorney General acknowledged that an appliance store, which also dealt in films, could have a film library, a substantial amount of which was found to be obscene, and remain untouched by Section 5. (Tr. 47-49) (On the other hand, the language of Section 5 is so vague that a strict reading would not necessarily exempt the appliance store from prosecution.)

The fact that Section 5 is allegedly directed against those who deal in press materials, when coupled with the only scienter requirement in Section 5, makes it clear that Section 5 is overbroad. Scienter, as defined in Section 2(3), means only that a person "knows or is aware that the material [possessed] contains, depicts, or describes sexual conduct . . ." Thus, a bookseller who wishes to sell printed materials of a sexual nature which are presumptively protected by the First Amendment would be threatened by the large fines of Section 5 and forced to act as his own censor. Not only might a bookseller be threatened, but he might actually be punished by imposition of such fines for disseminating protected material. The Attorney General stated that in sentencing

a Section 5 offender, a judge may not consider a business's profits. It was not explained how one would separate profits earned from sales of protected materials from profits made in the distribution of obscene matter. (Tr. 40-42) "[T]hough aimed at obscene matter, [Section 5] has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." *Smith* v *California*, 361 US 147, 155 (1959).

PRIOR RESTRAINT

Although the Supreme Court has not addressed the issue of whether exceedingly high fines for dissemination of press materials can act as an unconstitutional prior restraint on protected speech, plaintiffs persuasively argue that such penalties are indistinguishable from padlocking or closure laws which have been found unconstitutional. *See, e.g., Vance* v *Universal Amusement Co., Inc.*, 445 US 308 (1980) (Texas public nuisance statute authorized injunctions against habitual use of premises for commercial exhibition of obscene matter). The Court has already determined that the emphasis of a Section 5 fine is on the *place* of dissemination. The fact that the maximum fine of $100,000 for a Section 5 first offense is twenty times higher than the penalty for a Section 6 offense and one hundred times higher than that authorized for other misdemeanors leads to the inevitable conclusion that Section 5 is designed to close down the commercial enterprises of Section 5 misdemeanants. The minimum $50,000 fine and $5,000,000 maximum for a second Section 5 offense is confirmation of that intention.

The Attorney General states that imposition of a fine *after* all the elements of Section 5 have been proven beyond a reasonable doubt in no way restricts distribution of protected material because the penalty would be determined *only* by looking at the profits earned from

dissemination of obscene material. There simply is no language in Section 5 to support the Attorney General's narrow interpretation. Furthermore, the legislative analysis which he cites to support his construction actually refutes it. The argument in support of enrolled bill 899 states that:

> The bill would provide for fines for the dissemination of obscene material that reflect the billions of dollars at stake in the pornography business. Imposition of a fine of a few thousand dollars on an entrepreneur who may be making millions each year is only a slap on the wrist. The best way to curtail dissemination of pornography is to make it unprofitable, hence the bill's provisions for fines of up to $5 million. Attorney General's Ex. A 82.

The use of "obscene" to describe the offensive material and "pornography" to designate the industry penalized reveals that the penalties of Section 5 are meant to deter more than just obscene material. There are no findings that the "millions" being made "each year" arise only out of the sale of obscenity and not merely from the sale of the broad class of pornography. Thus, Section 5 serves to prevent future dissemination of presumptively protected speech before a determination has been made that that material is obscene. In bankrupting the entire business, the State discourages the sale of protected as well as obscene speech.

The Prosecutor suggests that Section 5 does not act as a prior restraint of protected speech because Sections 11 through 13 provide for a procedure whereby a person may seek from the attorney general or from a prosecuting attorney an advisory opinion as to whether or not possessed material is obscene. The existence of the procedure does not prevent a sentencing judge from con-

sidering the total profits of a business in determining an appropriate remedy. Although a prosecuting attorney will be barred from prosecuting a person for possession of obscenity with intent to disseminate if he has previously issued an advisory opinion finding that the alleged obscene matter is not obscene, nothing in Sections 11 through 13 prohibits that same prosecutor from charging a petitioner under Section 5 for dissemination of *other* material deemed obscene. The prior restraint of the Section 5 fine does not avoid constitutional infirmity through application of the Section 11 advisory proceeding. Such proceeding is simply inapposite to a determination of whether a restriction on dissemination of protected speech through imposition of onerous fines is proper. There is absolutely no relevant relationship between Sections 11 through 13 and Section 5 which would make Section 5 constitutional.

Section 5 provides that presumptively protected speech may suffer the effects of harsh fines without a judicial determination that such materials are obscene. In addition, the restrictive effect of the fine lasts for an indefinite period of time. Finally, no judicial determination need ever be made that all the penalized material fell outside the protection of the First Amendment. Therefore, Section 5 lacks the basic safeguards necessary to legitimize a system of prior restraint and is unconstitutional. *Southeastern Promotions, Ltd.* v *Conrad*, 420 US 546, 559-60 (1975).

Because the Court has found that Section 5 of PA 343 is unconstitutionally vague and overbroad and that it acts as an impermissible prior restraint on protected speech, it is unnecessary to address plaintiffs' equal pro-

tection argument. Defendants are enjoined from enforcing Section 5.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

Dated: 3/26/85

PROOF OF MAILING

UNITED STATES OF AMERICA
EASTERN DISTRICT OF MICHIGAN — ss.

I, the undersigned, hereby certify that I have on the 25th day of March, 1985, mailed a copy of the MEMORANDUM OPINION AND ORDER in the above-entitled cause to the following persons at the addresses given:

Steven M. Taylor, Esq.
20100 Civic Center Drive
Southfield, MI 48076
George H. Weller
Assistant Attorney General
793 Law Building
525 W. Ottawa
Lansing, MI 48913
Martin L. Kotch
130 E. Elizabeth Street
Detroit, Michigan 48201
Donald Kuebler
Asst. Prosecuting Attorney
100 Courthouse
Flint, Michigan 48502

/s/ Colette J. Lehoux
Secretary to Stewart A. Newblatt,
United States District Judge

STATE OF MICHIGAN
82ND LEGISLATURE — REGULAR SESSION OF 1984

Introduced by Senators A. Cropsey,
Fessler, Nichols, Fredricks, Faust and H. Cropsey

ENROLLED SENATE BILL No. 899

AN ACT to define and prohibit the possession or dissemination of obscene material under certain circumstances; to prohibit conduct related thereto; to provide penalties; to prohibit local units of government from enacting or enforcing any law, ordinance, or rule pertaining to matters under this act; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

Sec. 1. For the purposes of this act, the words and phrases in sections 2 to 4 have the meanings ascribed to them in those sections.

Sec. 2. (1) "Contemporary community standards" means the customary limits of candor and decency in this state at or near the time of the alleged violation of this act.

(2) "Disseminate" means to manufacture, sell, lend, rent, publish, exhibit, or lease, to the public for commercial gain, or to offer to or agree to any of the foregoing.

(3) "Knowledge of content and character" means having general knowledge or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, of the nature and character of the material involved. A person has such knowledge when he or she knows or is aware that the material contains, depicts, or describes sexual conduct whether or not such person has precise knowledge of the specific contents of the material. Such knowledge may be proven by direct or circumstantial evidence, or both.

(4) "Material" means anything tangible which is capable of being used or adapted to arouse prurient interest, whether through the medium of reading, observation, sound, or in any other manner, including but not limited to anything printed or written, any book, magazine, newspaper, pamphlet, picture, drawing, pictorial representation, motion picture, photograph, video tape, video disk, film, transparency, slide, or any other medium used to electronically produce or reproduce images on a screen, or any mechanical, chemical, or electronic repro-

duction. Material includes undeveloped photographs, molds, printing plates, and other latent representational objects notwithstanding that processing or other acts may be required to make its content apparent.

(5) "Obscene" means any material which meets all of the following criteria:

(a) That the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest.

(b) That the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(c) That the material depicts or describes, in a patently offensive way, sexual conduct.

Sec. 3. (1) "Person" means an individual, or a sole proprietorship, partnership, corporation, association, or other legal entity, or an agent or servant of an individual or legal entity.

(2) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion.

Sec. 4. (1) "Sexual conduct" means 1 or more of the following:

(a) Representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Representations or descriptions of masturbation, excretory functions, or a lewd exhibition of the genitals.

(2) "Simulated" means the explicit depiction or description of any of the types of conduct set forth in the definition of sexual conduct under subsection (1), which creates the appearance of such conduct.

(3) "Ultimate sexual acts" means sexual intercourse, fellatio, cunnilingus, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body; or depictions or descriptions of sexual bestiality, sadomasochism, masturbation, or excretory functions.

Sec. 5. (1) A person is guilty of obscenity in the first degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material if dissemination of obscene material is a predominant and

regular part of the person's business at a particular theater, store, warehouse, or other establishment and if obscene materials are a principal or substantial part of the stock in trade at that theater, store, warehouse, or other establishment.

(2) Obscenity in the first degree is a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $100,000.00, or both.

(3) A person who is convicted of a second or subsequent offense under this section is guilty of a misdemeanor and may be imprisoned for not more than 1 year, and shall be fined not less than $50,000.00 and not more than $5,000,000.00. For purposes of this section, an offense is considered a second or subsequent offense if the defendant has previously been convicted under this section or under any similar statute of the United States or any state.

Sec. 6. (1) A person is guilty of obscenity in the second degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, to the public any obscene material.

(2) Obscenity in the second degree is a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $5,000.00, or both.

Sec. 7. Sections 5 and 6 do not apply to the dissemination of obscene material by any of the following:

(a) An individual who disseminates obscene material in the course of the individual's employment and is employed by any of the following:

(i) A public or private college, university or vocational school.

(ii) A library which is established by the state; a county, city, township, village, or other local unit of government or authority or combination of local units of governments and authorities; or a community college district.

(b) An individual who disseminates obscene material in the course of the individual's employment and does not have discretion with regard to that dissemination or is not involved in the management of the employer.

Sec. 8. (1) A person shall not:

(a) As a condition to a sale, allocation, consignment, or delivery for the resale of any paper, magazine, periodical, book, publication, or other merchandise, require or demand that the purchaser or consignee receive for resale or further commercial distribution any obscene material.

(b) Deny, revoke, or threaten to deny or revoke a franchise, or impose or threaten to impose any penalty, financial or otherwise, because of the failure or refusal to accept obscene material or material reasonably believed by the purchaser or consignee to be obscene.

(2) A violation of this section is a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $500.00, or both.

Sec. 9. A prosecuting attorney or the attorney general may commence and prosecute an action under this act.

Sec. 10. (1) A municipality, township, village, city, or an instrumentality thereof shall not enact or enforce any law, ordinance, or rule which regulates, or intends to regulate, any matter covered by this act.

(2) Subsection (1) does not apply to a zoning law, zoning ordinance, or zoning rule.

Sec. 11. (1) A person intending to possess material for dissemination or intending to disseminate material that may be considered obscene may request, from the attorney general or from the prosecuting attorney of the county in which the dissemination is intended, an advisory opinion as to the legality of the possession or dissemination. The request for an advisory opinion shall be in writing and shall be accompanied by a reasonable and timely opportunity for the prosecuting attorney to examine the material. Not more than 5 business days after receipt of a proper request, the attorney general or the prosecuting attorney shall issue to the person making the request an advisory opinion, or a refusal to issue an advisory opinion, in writing. The advisory opinion shall state in unequivocal terms whether possession with intent to disseminate or dissemination of the material would be considered by the attorney general or the prosecuting attorney to violate this act.

(2) A person who has requested an advisory opinion under subsection (1) may commence an action for a declaratory judgment, to obtain an adjudication of the legality of the intended dissemination if either of the following conditions exist:

(a) The action is commenced more than 5 business days after submission of a proper request, and the attorney general or the prosecuting attorney to whom the request was made has failed to issue an advisory opinion.

(b) The attorney general or the prosecuting attorney has issued an advisory opinion and that opinion fails to state in unequivocal terms that possession with intent to disseminate or dissemination of the material would not be considered by the attorney general or the prosecuting attorney to whom the request was made to violate this act.

(3) The attorney general or the prosecuting attorney to whom the request was made shall be made the defendant to an action commenced pursuant to subsection (2).

(4) If the attorney general or the prosecuting attorney to whom the request was made, after commencement of the declaratory judgment action, issues an advisory opinion stating in unequivocal terms that knowing possession with intent to disseminate or dissemination of the material would not be considered by him or her to violate this act, the action shall be dismissed.

Sec. 12. The attorney general or the prosecuting attorney to whom a request for an advisory opinion was made under section 11 shall bear the burden of proving beyond a reasonable doubt that possession with intent to disseminate or dissemination of the specified material would violate this act for purposes of an action commenced under section 11(2).

Sec. 13. (1) Except as provided in this section, section 11 does not preclude prosecution for violation of this act.

(2) If a declaratory judgment has been issued pursuant to section 11 stating that possession with intent to disseminate or dissemination of specified material does not violate this act, the determination is a complete defense for a person against a prosecution under this act.

(3) If the attorney general or a prosecuting attorney issues an advisory opinion stating in unequivocal terms that possession with intent to disseminate or dissemination of specified material is not considered by him or her to violate this act, then the recipient of the opinion may not be prosecuted under this act for a violation of section 5 or section 6 for that specified material, unless the attorney general or prosecuting attorney who issued the advisory opinion notifies the recipient of the opinion that the advisory opinion is being withdrawn and the person is provided with at least 45 days' notice.

(4) An advisory opinion stating that possession with intent to disseminate or dissemination of specified material is not considered to violate this act which is issued by a prosecuting attorney shall be a bar to prosecution under this act only in the county in which the prosecutor who issued the opinion serves.

Sec. 14. Sections 343a to 343d, 344, 345, 345a, and 346 of Act No. 328 of the Public Acts of 1931, being sections 750.343a to 750.343d, 750.344, 750.345, 750.345a, and 750.346 of the Michigan Compiled Laws, are repealed.

/s/ William C. Kandler
Secretary of the Senate.
/s/ William A. Ryan
Clerk of the House of Representatives.

Approved _____

_____
Governor.

APPENDIX C

JUDGMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated June 28, 1985)

(DEQUINDRE BOOKS & NEWS, INC., et al, Plaintiffs, v HON. FRANK J. KELLEY, et al, Defendants — CIVIL ACTION NO: 85-40153)

This action came on for hearing before the Court, Honorable Stewart A. Newblatt, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It Is Ordered and Adjudged that defendants are permanently enjoined from enforcing Section 5 of 1984 Public Act 343.

ROBERT A. MOSSING, CLERK
BY: /s/ Ruth A. Jozwiak,
Deputy Clerk

Dated: June 28, 1985

TO: Steven M. Taylor, 20100 Civic Center Dr., Suite 300, Southfield, MI 48076; Allen M. Wolf, Richard Thompson, 1200 N. Telegraph Rd., Pontiac, MI 48053; George H. Weller, Assist. Atty. General, 793 Law Bldg., 525 West Ottawa, Lansing, MI 48913.

C-2

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan — Southern Division – Flint)

(Filed June 28, 1985)

(DEQUINDRE BOOKS AND NEWS, INC., a Michigan corporation and F.P. BOOKS AND NEWS, INC., a Michigan corporation, Plaintiffs, v HON. FRANK J. KELLEY, in his official capacity as Attorney General, State of Michigan, and L. BROOKS PATTERSON, in his official capacity as Prosecuting Attorney of the County of Oakland, State of Michigan, Defendants — NO: 85-CV-40153-FL)

Plaintiffs in this case seek a final order declaring Section 5 of the Enrolled Senate Bill No. 899, also known as 1984 Public Act 343, unconstitutional on its face and enjoining defendants from enforcing Section 5 against plaintiffs. They filed a motion for preliminary injunction which, pursuant to an order of June 4, 1985, has been consolidated with consideration of the merits of the complaint. Accordingly, the Court need not address defendants' position that a preliminary injunction would be improper at this stage. Only defendant Oakland County Prosecutor has responded.[1] The prosecutor's brief is perplexing because it exhibits an apparent disregard for this Court's holding in *511 Detroit St., Inc.* v *Kelley*, No. 85-40006 (ED Mich, Mar. 26, 1985), and an identical lawsuit arising out of Genesee County, Michigan. Particularly insulting to the dignity of the institution that is the United States District Court are the pages devoted to the argument that plaintiffs, who are similarly

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[1] Defendant Attorney General declines to respond because, as a defendant in *511 Detroit St., Inc.* v *Kelley*, No. 85-40006 (ED Mich, Mar. 26, 1985), he feels bound by the judgment in that case. *See* Attorney General's April 12, 1985 letter to Judge Newblatt.

situated to plaintiffs in *511 Detroit St.*, have failed to show a substantial likelihood of success on the merits,[2] when the *511 Detroit St.* decision was rendered 2½ months before defendant's brief was filed! Defendant's counsel is advised that his performance comes precariously close to a violation of Fed. R. Civ. P. 11,[3] a rule which this Court is bound to strictly enforce.

Defendant has failed to demonstrate why the Court should not rely on its opinion in *511 Detroit St.* to resolve this case. Therefore, that opinion is adopted as the holding in this case. However, a few further comments on several of defendant's statements are appropriate.

Defendant misses the point of the abstention issue. It is because there has been no proffered state law interpretation of Section 5 which would make a federal constitutional analysis unnecessary that this Court will not abstain. The burden is on defendant to demonstrate a valid interpretation of the law, and he has failed to meet

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[2] Defendant's sarcastic aside at page 29 of his conclusion lends nothing to his position and is somewhat unprofessional.

[3] Rule 11 provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

this challenge. *See Vance* v *Universal Amusement Co.*, 445 US 308, 316 n. 13 (1980).

Likewise, defendant has misconstrued plaintiffs' criticisms of Section 5 as an attempt to discredit the definition of obscenity established by the Supreme Court in *Miller* v *California*, 413 US 15 (1973). Plaintiffs simply are not challenging the *Miller* standard, but challenge the phrases "predominant and regular part of [a] person's business" and "principal or substantial part of the stock in trade." In a first amendment speech context, it is not enough for a defendant to suggest that someone could probably come up with a constitutionally valid analysis if just given the chance. For the same reason, defendant's discussion of the scienter requirement is misguided.

And finally, defendant's argument at page 8 of defendant's brief, that the plaintiffs should not complain about Section 5 because the standard the prosecution is obligated to establish in a prosecution thereunder "will be practically impossible to demonstrate," is a puzzlement. Having admitted this, it certainly does not make the standard any less unconstitutional. It does give rise to the question as to why counsel for the defendant is wasting his and this Court's valuable time.

Therefore, for the reasons stated in *511 Detroit St.* v *Kelley*, No. 85-40006 (ED Mich, Mar. 25, 1985), defendants are permanently enjoined from enforcing Section 5 of 1984 Public Act 343.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

Dated: 6/28/85

APPENDIX D

ORDER

(United States Court of Appeals for the Sixth Circuit)

(Filed February 13, 1987)

(511 DETROIT STREET, INC., A MICHIGAN CORPORATION, ET AL., Plaintiffs-Appellees, v. HON. FRANK J. KELLEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, STATE OF MICHIGAN, Defendant-Appellant — No. 85-1279/1622/1642)

BEFORE: KRUPANSKY and BOGGS, Circuit Judges, and PORTER,* Senior United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

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* Hon. David S. Porter sitting by designation from the Southern District of Ohio.

APPENDIX E

UNITED STATES CONSTITUTION

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCLA § 752.361-374

POSSESSION OR DISSEMINATION OF OBSCENE MATERIALS

Caption editorially supplied

P.A. 1984, No. 343, Eff. March 29, 1985

AN ACT to define and prohibit the possession or dissemination of obscene material under certain circum-

stances; to prohibit conduct related thereto; to provide penalties; to prohibit local units of government from enacting or enforcing any law, ordinance, or rule pertaining to matters under this act; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

752.361. Meaning of words and phrases

Sec. 1. For the purposes of this act, the words and phrases in sections 2 to 4[1] have the meanings ascribed to them in those sections.

P.A.1984, No. 343, § 1, Eff. March 29, 1985.

[1] Sections 752.362 to 752.364.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.362. Definitions

Sec. 2. (1) "Contemporary community standards" means the customary limits of candor and decency in this state at or near the time of the alleged violation of this act.

(2) "Disseminate" means to manufacture, sell, lend, rent, publish, exhibit, or lease, to the public for commercial gain, or to offer to or agree to any of the foregoing.

(3) "Knowledge of content and character" means having general knowledge or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, of the nature and character of the material involved. A person has such knowledge when he or she knows or is aware that the material contains, depicts, or describes sexual con-

duct whether or not such person has precise knowledge of the specific contents of the material. Such knowledge may be proven by direct or circumstantial evidence, or both.

(4) "Material" means anything tangible which is capable of being used or adapted to arouse prurient interest, whether through the medium of reading, observation, sound, or in any other manner, including but not limited to anything printed or written, any book, magazine, newspaper, pamphlet, picture, drawing, pictorial representation, motion picture, photograph, video tape, video disk, film, transparency, slide, or any other medium used to electronically produce or reproduce images on a screen, or any mechanical, chemical, or electronic reproduction. Material includes undeveloped photographs, molds, printing plates, and other latent representational objects notwithstanding that processing or other acts may be required to make its content apparent.

(5) "Obscene" means any material which meets all of the following criteria:

(a) That the average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest.

(b) That the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(c) That the material depicts or describes, in a patently offensive way, sexual conduct.

P.A.1984, No. 343, § 2, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.

C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.363. Definitions

Sec. 3. (1) "Person" means an individual, or a sole proprietorship, partnership, corporation, association, or other legal entity, or an agent or servant of an individual or legal entity.

(2) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion.

P.A.1984, No. 343, § 3, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.364. Definitions

Sec. 4. (1) "Sexual conduct" means 1 or more of the following:

(a) Representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Representations or descriptions of masturbation, excretory functions, or a lewd exhibition of the genitals.

(2) "Simulated" means the explicit depiction or description of any of the types of conduct set forth in the definition of sexual conduct under subsection (1), which creates the appearance of such conduct.

(3) "Ultimate sexual acts" means sexual intercourse, fellatio, cunnilingus, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body; or depictions or descriptions of sexual bestiality, sadomasochism, masturbation, or excretory functions.

P.A.1984, No. 343, § 4, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.365. First degree obscenity

Sec. 5. (1) A person is guilty of obscenity in the first degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, any obscene material if dissemination of obscene material is a predominant and regular part of the person's business at a particular theater, store, warehouse, or other establishment and if obscene materials are a principal or substantial part of the stock in trade at that theater, store, warehouse, or other establishment.

(2) Obscenity in the first degree is a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $100,000.00, or both.

(3) A person who is convicted of a second or subsequent offense under this section is guilty of a misdemeanor and may be imprisoned for not more than 1 year, and shall be fined not less than $50,000.00 and not more than $5,000,000.00. For purposes of this section, an offense is considered a second or subsequent offense if the defendant has previously been convicted under this section or under any similar statute of the United States or any state.

P.A.1984, No. 343, § 5, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.366. Second degree obscenity

Sec. 6. (1) A person is guilty of obscenity in the second degree when, knowing the content and character of the material, the person disseminates, or possesses with intent to disseminate, to the public any obscene material.

(2) Obscenity in the second degree is a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $5,000.00, or both.

P.A.1984, No. 343, § 6, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.367. Applications of sections 752.365 and 753.366

Sec. 7. Sections 5 and 6[1] do not apply to the dissemination of obscene material by any of the following:

(a) An individual who disseminates obscene material in the course of the individual's employment and is employed by any of the following:

(i) A public or private college, university or vocational school.

(ii) A library which is established by the state; a county, city, township, village, or other local unit of government or authority or combination of local units of governments and authorities; or a community college district.

(b) An individual who disseminates obscene material in the course of the individual's employment and does not have discretion

with regard to that dissemination or is not involved in the management of the employer.

P.A.1984, No. 343, § 7, Eff. March 29, 1985.

[1] Sections 752.365 and 752.366.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.368. Required resale or commercial distribution of obscene material; refusal by franchise to accept obscene material

Sec. 8. (1) A person shall not:

(a) As a condition to a sale, allocation, consignment, or delivery for the resale of any paper, magazine, periodical, book, publication, or other merchandise, require or demand that the purchaser or consignee receive for resale or further commercial distribution any obscene material.

(b) Deny, revoke, or threaten to deny or revoke a franchise, or impose or threaten to impose any penalty, financial or otherwise, because of the failure or refusal to accept obscene material or material reasonably believed by the purchaser or consignee to be obscene.

(2) A violation of this section is a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $500.00, or both.

P.A.1984, No. 343, § 8, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.369. Commencement and prosecution of actions

Sec. 9. A prosecuting attorney or the attorney general may commence and prosecute an action under this act.

P.A.1984, No. 343, § 9, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.370. Exclusive regulation

Sec. 10. (1) A municipality, township, village, city, or an instrumentality thereof shall not enact or enforce any law, ordinance, or rule which regulates, or intends to regulate, any matter covered by this act.

(2) Subsection (1) does not apply to a zoning law, zoning ordinance, or zoning rule.

P.A.1984, No. 343, § 10, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.371. Advisory opinions of attorney general or prosecuting attorneys; declaratory judgments

Sec. 11. (1) A person intending to possess material for dissemination or intending to disseminate material that may be considered obscene may request, from the attorney general or from the prosecuting attorney of the county in which the dissemination is intended, an advisory opinion as to the legality of the possession or dissemination. The request for an advisory opinion shall be in writing and shall be accompanied by a reasonable and timely opportunity for the prosecuting attorney to examine the

material. Not more than 5 business days after receipt of a proper request, the attorney general or the prosecuting attorney shall issue to the person making the request an advisory opinion, or a refusal to issue an advisory opinion, in writing. The advisory opinion shall state in unequivocal terms whether possession with intent to disseminate or dissemination of the material would be considered by the attorney general or the prosecuting attorney to violate this act.

(2) A person who has requested an advisory opinion under subsection (1) may commence an action for a declaratory judgment, to obtain an adjudication of the legality of the intended dissemination if either of the following conditions exist:

(a) The action is commenced more than 5 business days after submission of a proper request, and the attorney general or the prosecuting attorney to whom the request was made has failed to issue an advisory opinion.

(b) The attorney general or the prosecuting attorney has issued an advisory opinion and that opinion fails to state in unequivocal terms that possession with intent to disseminate or dissemination of the material would not be considered by the attorney general or the prosecuting attorney to whom the request was made to violate this act.

(3) The attorney general or the prosecuting attorney to whom the request was made shall be made the defendant to an action commenced pursuant to subsection (2).

(4) If the attorney general or the prosecuting attorney to whom the request was made, after commencement of the declaratory judgment action, issues an

advisory opinion stating in unequivocal terms that knowing possession with intent to disseminate or dissemination of the material would not be considered by him or her to violate this act, the action shall be dismissed.

P.A.1984, No. 343, § 11, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.372. Burden of proof for advisory opinions

Sec. 12. The attorney general or the prosecuting attorney to whom a request for an advisory opinion was made under section 11 [1] shall bear the burden of proving beyond a reasonable doubt that possession with intent to disseminate or dissemination of the specified material would violate this act for purposes of an action commenced under section 11(2). [2]

P.A.1984, No. 343, § 12, Eff. March 29, 1985.

[1] Section 752.371.
[2] Section 752.371(2).

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.370. Declaratory judgments and advisory opinions as bars to prosecution

Sec. 13. (1) Except as provided in this section, section 11 [1] does not preclude prosecution for violation of this act.

(2) If a declaratory judgment has been issued pursuant to section 11 stating that possession with intent to disseminate or dissemination of specified material

does not violate this act, the determination is a complete defense for a person against a prosecution under this act.

(3) If the attorney general or a prosecuting attorney issues an advisory opinion stating in unequivocal terms that possession with intent to disseminate or dissemination of specified material is not considered by him or her to violate this act, then the recipient of the opinion may not be prosecuted under this act for a violation of section 5 or section 6 for that specified material, unless the attorney general or prosecuting attorney who issued the advisory opinion notifies the recipient of the opinion that the advisory opinion is being withdrawn and the person is provided with at least 45 days' notice.

(4) An advisory opinion stating that possession with intent to disseminate or dissemination of specified material is not considered to violate this act which is issued by a prosecuting attorney shall be a bar to prosecution under this act only in the county in which the prosecutor who issued the opinion serves.

P.A.1984, No. 343, § 13, Eff. March 29, 1985.

[1] Section 752.371.

Library References

Obscenity ☞5 to 7.
C.J.S. Obscenity §§ 2 to 10, 13 to 19.

752.374. Repealer

Sec. 14. Sections 343a to 343d, 344, 345, 345a, and 346 of Act No. 328 of the Public Acts of 1931, being sections 750.343a to 750.343d, 750.344, 750.345, 750.

345a, and 750.346 of the Michigan Compiled Laws, are repealed.

P.A.1984, No. 343, § 14, Eff. March 29, 1985.

Library References

Obscenity ☞5 to 7.

C.J.S. Obscenity §§ 2 to 10, 13 to 19.

Supreme Court, U.S.
FILED
MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1629

In The

Supreme Court of the United States

October Term, 1986

511 DETROIT STREET, INC., a Michigan corporation, and EXECUTIVE ART STUDIO, INC., a Michigan corporation,

-v- *Petitioners,*

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, et al.,

and *Respondents,*

DEQUINDRE BOOKS AND NEWS, INC., a Michigan corporation, and F. P. BOOKS AND NEWS, INC., a Michigan corporation,

-v- *Petitioners,*

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, and L. BROOKS PATTERSON, In his official capacity as Prosecuting Attorney, County of Oakland,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PROSECUTING ATTORNEY L. BROOKS PATTERSON IN OPPOSITION

L. BROOKS PATTERSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

RICHARD H. BROWNE
Assistant Prosecuting Attorney

MARGARET G. HORENSTEIN
Assistant Prosecuting Attorney
Counsel of Record
1200 North Telegraph Road
Pontiac, Michigan 48053
(313) 858-0685

Attorneys for Respondents

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

QUESTIONS PRESENTED

I.

WHETHER THE WORDING OF THE MICHIGAN OBSCENITY STATUTE IS SUFFICIENTLY PRECISE SO AS TO GIVE MEN OF COMMON UNDERSTANDING WARNING AS TO WHAT CONDUCT IS FORBIDDEN AND TO SET FORTH READILY ASCERTAINABLE STANDARDS OF ENFORCEMENT?

II.

WHETHER THE SCIENTER REQUIREMENT INCLUDED IN THE STATUTE IS SUFFICIENT, AS WRITTEN OR AS IT MAY BE AUTHORITATIVELY CONSTRUED BY A STATE COURT, TO LIMIT THE REACH OF THE MICHIGAN OBSCENITY STATUTE ONLY TO KNOWING PURVEYORS OF OBSCENE MATERIALS?

III.

WHETHER THE STATE MAY IMPOSE SUBSTANTIAL FINES ON INDIVIDUALS CONVICTED OF VIOLATING CRIMINAL LAWS FOLLOWING AN ADJUDICATION OF GUILT UNDER THE MICHIGAN OBSCENITY STATUTE BY A JUDGE OR JURY?

IV.

WHETHER THE STATE OF MICHIGAN MAY DETERMINE THAT A COMPELLING INTEREST IN THE ERADICATION OF OBSCENITY JUSTIFIES THE IMPOSITION OF THE CRIMINAL FINES AND PENALTIES SET FORTH IN THE MICHIGAN OBSCENITY STATUTE ON OWNERS OF ESTABLISHMENTS DEALING PRIMARILY IN OBSCENE MATERIAL AND, IN SO DOING, CONSTITUTIONALLY PUNISH MAJOR OBSCENITY DEALERS MORE SEVERELY THAN OCCASIONAL SELLERS?

LIST OF PARTIES

The parties to this action below were the Petitioners, 511 Detroit Street, Inc.; Executive Art Studio, Inc.; Dequindre Books And News, Inc.; and F. P. Books And News, Inc.; and the Respondents, Frank J. Kelley, Attorney General for the State of Michigan; and L. Brooks Patterson, Prosecuting Attorney for the County of Oakland.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PROSECUTING ATTORNEY L. BROOKS PATTERSON IN OPPOSITION

Respondent L. Brooks Patterson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 807 F2d 1293 (1986).

STATEMENT OF THE CASE

Petitioners 511 Detroit Street, Inc. ["511 Detroit"] and Executive Art Studio, Inc. ["Art Studio"] filed in the United States District Court for the Eastern District of Michigan, Southern Division, a complaint for declaratory judgment seeking facial invalidation of section 5 of the newly-enacted Michigan Obscenity Statute [MCL 752.361-752.374] and a motion for preliminary injunction against enforcement of section 5 [MCL 752.365]. (Pet. pp E-1–E-12) This filing occurred on January 7, 1985, almost three months before the statute was to take effect on March 29, 1985. The filing was made in the Flint Division of the Eastern District and was accordingly assigned to District Judge Stewart A. Newblatt.

On March 26, 1985, the District Court struck down MCL 752.365 declaring it unconstitutionally vague, overbroad, and a prior restraint on free speech. (Pet. pp B-2–B-13) A judgment was filed March 27, 1985, and Respondent Kelley filed a Notice of Appeal on April 1, 1985.

Meanwhile, on March 13, 1985, Petitioners Dequindre Books And News, Inc. ["Dequindre"] and F. P. Books And News, Inc. ["F. P."] filed an identical complaint in the United States District Court for the Eastern District of Michigan, Southern Division, directed against Respondent Patterson, knowing that under local rule the action would be assigned to Judge Newblatt. On June 28, 1985, without conducting a hearing or other in-court proceeding, Judge Newblatt issued a memorandum opinion and order which essentially adopted his conclusions in the earlier opinion involving Petitioners 511 Detroit and F. P. (Pet. pp C-1–C-4) Both Respondents filed Notices of Appeal and these appeals were consoli-

dated with the appeal already pending in the 511 Detroit ~~Street~~ case.

On December 17, 1986, a three-judge panel for the Sixth Circuit Court of Appeals issued a unanimous opinion authored by Judge Boggs which reversed the decisions of the district court. *511 Detroit Street, Inc.* v *Kelley*, 807 F2d 1293 (CA 6, 1986) (Pet. Appen. A). The Sixth Circuit found the terms utilized in the Michigan Obscenity Statute "are found throughout civil and criminal codes, and throughout reported cases." The Court further found that the statute did not encourage arbitrary enforcement since an official seeking a conviction under MCL 752.365 would be required to first prove all of the elements of a second-degree offense (under MCL 752.366) — which Petitioners did not challenge — and then prove additional elements before a conviction could be obtained. The Sixth Circuit finally held that the large potential fines provided for in MCL 752.365 did not constitute a prior restraint because those fines would only be imposed following a judicial determination of obscenity. Once a finding of guilt has been made in a judicial proceeding, criminal sanctions can properly be imposed.

The Court did not address Petitioners' claims of equal protection and cruel and unusual punishment violations. These claims had not been addressed by the district court, either.

Petitioners moved for rehearing *en banc* in the Sixth Circuit. Their petition was denied on February 13, 1987. (Pet. p D-1) Without seeking a stay of the mandate, Petitioners have filed the instant petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE TERMS USED IN THE MICHIGAN OBSCENITY STATUTE WERE SUFFICIENTLY PRECISE.

Petitioners first argue that the Michigan Obscenity Statute is unconstitutionally vague. Specifically, Petitioners have argued that the terms "predominant", "regular part", "principal", "substantial", and "stock in trade" are too indefinite to allow men of common intelligence to understand them. Further, Petitioners contend, these words would give unfettered discretion to law enforcement officials and would thereby encourage arbitrary enforcement. The Sixth Circuit properly rejected these arguments.

As Respondent Kelley has pointed out (and as the Sixth Circuit acknowledged), these terms "are found thoughout civil and criminal codes, and throughout reported cases." *511 Detroit Street, Inc., supra,* at 1296. This Court recently reviewed a statute containing these phrases in response to a vagueness challenge concerning the use of the word "lust" as found in those statutes. *Brockett* v *Spokane Arcades, Inc.*, 472 US 491 (1985).

The Sixth Circuit correctly recognized that even though there might be speculative situations where it would be difficult to determine whether the establishments in question were subject to the challenged statute, that fact "does not make a statute unconstitutional . . . , particularly where the margin in question is not that between criminal and non-criminal conduct, but is, as here, that between degrees of criminal conduct." *511 Detroit Street, Inc., supra,* at 1296.

The Sixth Circuit further correctly recognized that there could be no danger of arbitrary law enforcement. Petitioners did not challenge the definitions of obscenity contained in both the sections defining first and second degree obscenity. Therefore the vagueness challenge was only directed at those terms set forth above which differentiated first from second degree obscenity. Since those terms "are within the common understanding of ordinary people" (*id.* at 1296), there is little likelihood of arbitrary enforcement based on a misunderstanding of the terms. The penalties between the two sections differ little — both being misdemeanors — and it is only the size of the potential fines which sets them apart. The essential elements of a second degree obscenity charge (which Petitioners do not challenge) must be proved and then the additional elements that make up a first degree obscenity charge are necessary to elevate the offense. The Sixth Circuit correctly recognized these facts would minimize the concern that an official might seek to enforce the first degree obscenity provision on a whim.

Petitioners have therefore failed to demonstrate error in the decision of the Sixth Circuit. Accordingly there is no reason to grant their petition for certiorari.

II.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE REACH OF THE MICHIGAN OBSCENITY STATUTE WAS SUFFICIENTLY LIMITED BY THE SCIENTER REQUIREMENT CONTAINED IN THE STATUTE.

Petitioners next contend that the Michigan Obscenity Statute is unconstitutionally overbroad. The Sixth Circuit properly rejected this argument.

As the Sixth Circuit recognized, MCL 752.365, "by its terms, applies only to one who knows 'the content and

character of the material.'" *511 Detroit Street, Inc., supra,* at 1297. This scienter element essentially tracks scienter language as expressed by this Court in *Hamling* v *United States,* 418 US 87, 123 (1974) and *Mishkin* v *New York,* 383 US 502, 510 (1966). MCL 752.362. A defendant must know the contents and character of the material in question in order to be convicted under the Michigan Obscenity Statute.

Although the Court of Appeals was troubled by certain language in MCL 752.362, it recognized (as the district court had refused to) that a narrowing state court interpretation of this troubling apparent presumption could "render unnecessary" the need for a federal court to make a determination of facial invalidity concerning an as yet unconstrued state statute. *511 Detroit Street, Inc., supra,* at 1298. [Respondent Kelley has sought to get the district court to certify this question to the Michigan Supreme Court, but Respondents have refused to join in this motion, preferring instead to seek relief in this Court.]

Finally, the Sixth Circuit also correctly determined that the Michigan Obscenity Statute was overbroad in that it might punish a bookseller's dissemination of protected materials since imposition of a large fine could be based upon the bookseller's total profits rather than just his profits derived from the sale of obscene (and therefore unprotected) materials. A sentencing court must individualize punishment in Michigan. *People* v *McFarlin,* 389 Mich 557, 574; 208 NW2d 504 (1973). This individualized assessment allows consideration of a defendant's ability to pay based upon his total financial condition. Such a determination is constitutional. *San Antonio School Dist.* v *Rodriguez,* 411 US 1, 22 (1973); *Bearden* v *Georgia,* 461 US 660, 670 (1983).

Since the Sixth Circuit properly rejected Petitioner's overbreadth argument, there is no reason for this Court to grant their petition for certiorari.

III.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE POTENTIAL FINES WHICH MAY BE IMPOSED FOLLOWING A CONVICTION UNDER THE MICHIGAN OBSCENITY STATUTE DO NOT CAUSE THE STATUTE TO OPERATE AS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON FREE SPEECH.

Petitioners next contend that the large potential fines which may be imposed under MCL 752.365 will have the effect of restraining future speech. The Sixth Circuit properly dismissed this argument.

As the Sixth Circuit stated:

> * * * The fact that a person does some business disseminating protected materials cannot immunize that person from large fines that may be imposed for violation of criminal law. * * *
>
> *511 Detroit Street, Inc., supra,* at 1299.

Likewise, this Court quite recently rejected a similar argument in *Arcara* v *Cloud Books, Inc.*, 478 US ___; 106 S Ct 3172, 3177; 92 L Ed 2d 568, 577 (1986):

> * * * [N]either the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment activities. * * *

This Court went on to note:

> * * * [W]e must reject the Court of Appeals' reasoning analogizing the closure order sought in this case to an unconstitutional prior restraint

> under *Near* v *Minnesota*, * * * . The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited — indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.
>
> 106 S Ct at 3177 fn 2.

Under the instant statute no materials are suppressed. Instead the dissemination of obscenity is provided with criminal consequences. Conviction for dissemination results in differing penalties. One who on one (or a few) occasion(s) disseminates obscenity can be penalized (after conviction) by a term of imprisonment *or* by a fine. One who knowingly disseminates obscenity as a predominant *and* regular part of his business *and* possesses obscene materials as a principal or substantial part of his stock in trade may (upon conviction) be subjected to a term of imprisonment or higher fines. Both types of convictions (first and second degree obscenity) are criminal misdemeanors. The degree of culpability is reflected in the potential fines which may be imposed.

The very essence of prior restraints is that they are governmental actions directed at suppression prior to adjudications. *Near* v *Minnesota*, 283 US 693 (1931); *Joseph Burstyn, Inc.* v *Wilson*, 343 US 495 (1951). The essence of the instant statute is not suppression at all, but the infliction of a severe criminal penalty after conviction. The severity of the penalty is a matter for the legislature,

not the judiciary. It is an expression of the legislative determination that the proliferation of obscenity is harmful to the health and welfare of the citizens of this state. A court should not substitute its beliefs for the determination of the legislature.

This Court has consistently held that following a criminal conviction, a court may properly impose fines and other criminal penalties on a convicted defendant. As stated by this Court in *Kingsley Books, Inc.* v *Brown*, 354 US 436, 441-442 (1957): "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." Each case must be viewed on its facts. In *Arcara, supra*, for example, the closure order would have shut down the bookstore completely for one year. Nevertheless, this Court declined to hold this incidental burden on the dissemination of speech-related materials unconstitutional.

The potential imposition of a large fine in some future case under MCL 752.365 may cause a bookseller to think twice before offering a particular publication to the public. But that "self-censorship" is no different than what occurs when a bookseller acts to withhold a book because of his fear of possible incarceration should the book be found obscene in a judicial proceeding. Moreover, the statute provides that a merchant who is concerned that some of his wares may be obscene can request an advisory opinion from the county prosecutor or the attorney general. MCL 752.371(1). The person may also commence an action for a declaratory judgment under MCL 752.371(2). The prosecutor or the attorney general bear the burden of proof in such an action. MCL 752.372. Such a scheme has been approved by this Court in *Bantam Books, Inc.* v *Sullivan*, 372 US 58, 71-72 (1963).

Under the circumstances, it cannot be said that Petitioners' First Amendment rights are impermissibly restrained so as to warrant the extreme remedy of judicial nullification. Their petition should therefore be denied.

IV.

THIS COURT SHOULD NOT CONSIDER PETITIONER'S EQUAL PROTECTION CHALLENGE WHERE THAT CLAIM HAS NEVER BEEN RULED ON BY THE LOWER COURTS AND WHERE ANY DIFFERENTIATION IN TREATMENT CONTAINED IN THE MICHIGAN OBSCENITY STATUTE IS JUSTIFIED ON THE BASIS OF THE STATE'S COMPELLING INTEREST IN CONTROLLING AND ERADICATING OBSCENITY.

Petitioners finally urge this Court to determine that the potential fines which may be imposed upon conviction serve to single-out booksellers, newsdealers, and theater operators for differential treatment since they are the only individuals likely to have sufficient stocks of potentially obscene materials to be concerned about the impact of the statute. In Petitioners' view this violates the constitutional prohibition against unequal treatment. US Const., amend. XIV. A decision on this question would be premature. The statute has not yet been enforced so no fines have been imposed. Moreover, this issue was not addressed or decided by the Sixth Circuit or the district court; therefore, a decision by this Court should await a more thorough discussion of this issue in some future case.

Should this Court decide to review this issue, it may readily determine that the Michigan Obscenity Statute does not deny equal protection to Petitioners (or other prospective defendants). The classification systems that are subject to equal protection attack are those that act before a constitutionally proper adjudication has

occurred. For example, systems which require segregation by race, sex, or alienage, all act without judicial intervention. They are legislative schemes utilized to restrict the access of certain specified groups to particular (otherwise permissible) activities on the basis of prohibited classes. The system of fines in the Michigan Obscenity Statute is not analogous to those legislative classification systems. Fines are imposed only after a conviction — which necessarily follows an adjudication that has determined that the materials in question are *not* protected by the First Amendment.

By passing this Act, the state legislature has indicated that it feels the elimination of obscenity is an important state purpose. This Court has recognized the validity of this viewpoint. *New York* v *Ferber*, 458 US 747, 760-761 (1982). As Respondent Kelley points out in his brief in opposition (at page 15), this Court in *Plyer* v *Doe*, 457 US 202, 216 (1982), has recognized that state legislatures must be given "substantial latitude to establish classifications". See also: *McGinnis* v *Royster*, 410 US 263, 269-270 (1973). Moreover, the fines must be judged from the viewpoint that they are "stiffer" because they are imposed for a conviction of an offense deemed more serious by the legislature than a second degree obscenity offense under MCL 752.366. The comparison between these fines and other criminal statutes is simply inappropriate.

Lower federal courts have rejected similar equal protection challenges to a state's ability to establish classification systems in the realm of obscenity. *Peipenburg* v *Cutler*, 649 F2d 783, 787 (CA 10, 1981); *M. S. News Co.* v *Casado*, 721 F2d 1281, 1291-1292 (CA 10, 1983).

Petitioners have expressed concern and dissatisfaction with the proposed operation of this statute because of its asserted impact on protected expression. However, this

statute carefully uses the standards of *Miller* v *California*, 413 US 15 (1973) to separate protected expression from obscenity. Having done so, the First Amendment protection extended to books and films ceases. Since fines would be imposed based upon dissemination of unprotected materials, the concerns of Petitioners are misplaced. There is no violation of their right to equal protection.

CONCLUSION

For the reasons set forth above, Respondent Patterson respectfully asserts that the petition for writ of certiorari should be denied.

Respectfully submitted,

L. BROOKS PATTERSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

MARGARET G. HORENSTEIN
Assistant Prosecuting Attorney
Counsel of Record
1200 North Telegraph Road
Pontiac, Michigan 48053
(313) 858-0685

RICHARD H. BROWNE
Assistant Prosecuting Attorney

Attorneys for Respondents

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CLERK

No. 86-1629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

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511 DETROIT STREET, et al,

Petitioners,

v.

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, et al,

Respondents.

and

DEQUINDRE BOOKS AND NEWS, INC, et al,

Petitioners,

v.

HON. FRANK J. KELLEY, et al,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT ATTORNEY GENERAL FRANK J. KELLEY IN OPPOSITION

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

George H. Weller
Assistant Attorney General

Attorneys for Respondents

24pp

QUESTIONS PRESENTED FOR REVIEW

I.

May a state meet the intractable obscenity problem by seeking to dry up the market for this material through higher fines on persons who, knowing the content and character of the material, disseminate obscene material for commercial gain at a business in which the dissemination of obscene material is a predominant and regular part of the business, and obscene material is a principal or substantial part of the stock in trade?

II.

Are the following terms unconstitutionally vague?

"Predominant and Regular".

"Principal or Substantial".

"Predominant and regular part of a person's business".

"Principal or substantial part of the stock in trade".

LIST OF PARTIES

The petitioners are four Michigan corporations that do not deny that some of the materials that they disseminate for commercial gain at their establishments may be obscene.

The respondents are the Attorney General of Michigan, and two of Michigan's county prosecutors.

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No. 86-1629

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT ATTORNEY GENERAL FRANK J. KELLEY IN OPPOSITION

Respondent Frank J. Kelley, Attorney General of the State of Michigan, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case reported at 807 F2d 1293 (1986).

STATEMENT OF THE CASE

Petitioners are businesses "who never deny that some of their retailed items may be obscene" (Pet. p B-4). They do business from stores that advertise "adult books" or "peep shows", or they advertise that they sell "love products", or they advertise "female models", "escort service" or "adult movies". The buildings are so constructed, or their windows are so located or blocked, that an outside observer cannot see what is inside. They restrict entry to those who are 18 or older.

There is no issue in this case of the meaning of "obscenity" (Pet. p 4 and p C-4), or whether disseminated materials are "obscene" (Pet. p B-4).

Two months before the March 29, 1985 effective date of Michigan's new anti-obscenity law, these businesses sought an injunction against the "first degree obscenity" portion of the law (MCL 752.365; MSA 28.579(365); (Pet. p E-5)), because they claimed that they could not determine how much obscene material they could carry in their businesses before they were subject to the higher criminal misdemeanor fines of the "first degree" portion of the law. They made no complaint of the "second degree obscenity" portion of the law that included a criminal misdemeanor fine for dissemination to the public for commercial gain of any obscene material when the disseminator knows the content and character of the material. MCL 752.366; MSA 28.579(366); (Pet. p E-6).

The first degree obscenity portion of the law includes the same wording as the second degree obscenity portion, but with additional wording to make the higher penalties applicable only to those whose businesses also have the dissemination of obscene material as a "predominant and regular part of the person's business", and that have

obscene material as "a principal or substantial part of the stock in trade." MCL 752.365; MSA 28.579(365); (Pet. p E-5).

The only individual subject to the criminal penalties of the law is one who has "discretion with regard to that dissemination [of obscene material] or is ... involved in the management of the employer." MCL 752.367(b); MSA 28.579(367)(b); (Pet. pp E-6 to E-7).

The stated purpose of the Michigan Legislature in setting forth higher criminal misdemeanor fines for "first degree obscenity" is to make obscenity unprofitable. The Michigan Senate Analysis Section Analysis dated December 13, 1984, stated:

> "The bill would provide for fines for the dissemination of obscene material that reflect the billions of dollars at stake in the pornography business. Imposition of a fine of a few thousand dollars on an entrepreneur who may be making millions each year is only a slap on the wrist. The best way to curtail dissemination of pornography is to make it unprofitable, hence the bill's provisions for fines of up to $5 million."

The District court "compliment[ed] plaintiffs' attorneys on the high professional quality of their presentation and argument" and "merely paraphrase[d] the points appropriately made by plaintiffs" (Pet. p B-3); finding the "first degree obscenity" portion of the law vague and overbroad and a prior restraint. (Pet. p B-12). The Sixth Circuit reversed and remanded, saying on the issue of vagueness that

> "plaintiffs do not appear to have a problem determining when their conduct is criminal, but they complain that they cannot determine

with sufficient precision just how criminal it is." 807 F2d at 1295; (Pet. p A-6).

The Sixth Circuit pointed out that the words and terms challenged by the disseminators of obscene materials "are found throughout civil and criminal codes and throughout reported cases" (807 F2d at 1296; (Pet. p A-8)), and "are within the understanding [of] ordinary people." 807 F2d at 1296; (Pet. p A-8).

The Sixth Circuit also recognized that an enforcement official must prove all the elements of the "second degree obscenity" offense; and, in addition, must prove the additional elements of "the first degree obscenity" offense, holding that this does not encourage arbitrary or discriminatory enforcement. 807 F2d at 1297; (Pet. p A-9). On the issue of overbreadth, the Sixth Circuit pointed out that a sentencing judge may consider the business's total profits in determining an appropriate fine, and that a fine is not limited to amounts derived from the dissemination of obscene materials only. 807 F2d at 1297 and 1299; (Pet. pp A-9 to A-10; Pet. p A-13).

Because it was very close to the approved language in *Mishkin* v *New York*, 383 US 502, 510 (1966), the Sixth Circuit found Constitutional the law's scienter requirement of knowledge of "the content and character of the material", that is, "general knowledge or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, of the nature and character of the material involved". (MCL 752.362(3), sentence 1; MSA 28.579(362)(3), sentence 1; (Pet. p E-2)). 807 F2d at 1297; (Pet. pp A-10 to A-11).

The succeeding language in the second sentence of MCL 752.362(3); MSA 28.579(362)(3); (Pet pp E-2

to E-3), that defined when a person had such knowledge, "troubled" the Sixth Circuit (807 F2d at 1298, (Pet. p A-11)), but the Sixth Circuit "decline[d] to determine the facial constitutionality of this language in advance of its application and construction by the Michigan courts." 807 F2d at 1298; (Pet. p A-13). The case was "remand[ed] to the District Court for proceedings consistent with this opinion." 807 F2d at 1299; (Pet. p A-14).

Counsel for the petitioners would not concur with a suggestion for certification to the Michigan Supreme Court when, after remand, concurrence was verbally sought under the local rule of the District Court. Counsel has yet to respond to respondent Michigan Attorney General Kelley's written suggestion to the District court for certification to the Michigan Supreme Court.

The Sixth Circuit also held that the large potential fine for a "first degree obscenity" conviction did not act as a prior restraint; saying:

> "[W]e find no case law to support the notion that a fine for illegal activity cannot be paid from lawfully obtained money, even where that lawfully obtained money is the result of disseminating protected expression." 807 F2d at 1299; (Pet. p A-14).

Petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied. (Pet. p D-1). Petitioners' petition for writ of certiorari followed. Petitioners never sought a stay of the Sixth Circuit's mandate, either before or after it was issued on February 26, 1987.

REASONS FOR DENYING THE WRIT

I

THE TERMS USED TO DISTINGUISH MICHIGAN'S FIRST DEGREE OBSCENITY FROM SECOND DEGREE OBSCENITY CONVEY SUFFICIENTLY DEFINITE WARNING AS TO THE PROSCRIBED CONDUCT WHEN MEASURED BY COMMON UNDERSTANDING AND PRACTICES, AND GIVE ADEQUATE WARNING OF THE CONDUCT PROSCRIBED.

In seeking to meet what this Court has called "'the intractable obscenity problem'", *New York* v *Ferber*, 458 US 747, 754 (1982), the State of Michigan has chosen to try to "dry up the market for this material", *New York* v *Ferber*, 458 US 747, 760 (1982), by permitting heavier fines to be imposed upon conviction of those "persons" for whom the dissemination of obscene material is

> "a predominant ... part of the person's business",
>
> and
>
> "a regular part of the person's business",
>
> and
>
> "a principal or substantial part of the stock in trade".
>
> MCL 752.365(1); MSA 28.579(365)(1); (Pet. p E-5).

Petitioners complain at pages 11-12 that these terms are vague. The Sixth Circuit correctly stated that "the challenged terms are found throughout civil and criminal codes, and throughout reported cases" (807 F2d at 1296; (Pet.

p A-8)), and that ordinary people can understand what conduct is prohibited. 807 F2d at 1295-1296; (Pet. pp A-7 to A-8).

Some examples of where those terms (or their components) are found and/or discussed are:

"Principal or substantial part of the stock in trade":

Nortown Theatre Inc v *Gribbs*, 373 F Supp 363, 367 (ED Mich, 1974), (adult motion picture theatre zoning), *aff'd sub nom*, *Young* v *American Mini Theatres, Inc*, 427 US 50 (1976).

15192 Thirteen Mile Road v *City of Warren*, 626 F Supp 803, 820-821 (ED Mich, 1985), (adult bookstore zoning).

Strand Property Corp v *Municipal Court*, 148 Cal App 3d 882, 889-890, 200 Cal Rptr 47, 51 (4th Dist 1983), (adult motion picture theater zoning).

Kuhns v *Santa Cruz County Board of Supervisors*, 128 Cal App 3d 369, 376, 181 Cal Rptr 1, 4 (4th Dist 1982), (adult bookstore zoning).

42 USC §2000a(c)(1982).

Webster's Third New International Dictionary pp 1802, 2247, 2280 (Unabridged 1976 ed).

83 CJS pp 97-98 (1953).

N.C. Gen. Stat. §19-1.2.(4)(1983).

"Predominant and regular part of the business":

Hart Book Stores, Inc v *Edminsten*, 612 F2d 821, 834 (4th Cir 1979), (limiting location of "adult establishment").

Webster's Third New International Dictionary pp 302, 1786, 1913 (Unabridged 1976 ed).

12A CJS pp 470 (1980).

76 CJS pp 608-609 (1952).

N.C. Gen Stat §19-1.2.(1)(1983).

See:
Brockett v *Spokane Arcades, Inc*, 472 US 491, 493 (1985).

State v *Chateau X*, 296 NC 251, 257; 250 SE2d 603, 607 (1979), *readopted after being vacated and remanded* from U.S. Supreme Court (445 US 947 (1980)), 302 NC 321; 275 SE2d 443 (1981).

Fehlharber v *North Carolina*, 675 F2d 1365, 1367 (4th Cir 1982).

This language in the Michigan statute is at least as definite as that in many other criminal statutes which this Court has upheld against a charge of vagueness.

See, e.g., the list in *United States* v *Harriss*, 347 US 612, 624 fn 15 (1954);

and

Jordan v *DeGeorge*, 341 US 223, 231 fn 15 (1951).

II

THERE IS NO BASIS FOR PETITIONERS' ARGUMENT CONCERNING A LACK OF A SCIENTER REQUIREMENT.

Petitioners' argument at pg 14 that there is no scienter requirement for all of the first degree obscenity section of the Michigan statute is totally without substance.

The section requires a knowledge of "the content and character of the material", and the special requirements of the first degree obscenity section are all related to the "material", i.e.

> "if dissemination of obscene material [of which the 'person' knows the content and character] is a predominant and regular part of the person's business...".
>
> "if obscene materials [of which the 'person' knows the content and character] are a principal or substantial part of the stock in trade ...".
> MCL 752.365(1); MSA 28.579(365)(1);
> (Pet. p E-5)).

The legislative history clearly states that "For either first or second degree obscenity the person would have to know the content and character of the material." The Michigan Senate Analysis Section Analysis, dated December 13, 1984, says:

> "A person would be guilty of obscenity in the first degree when he or she disseminated ... any obscene material if dissemination of obscene material was a 'predominant and regular part of the person's business at a particular ... establishment and if obscene materials were a 'principal or substantial

> part' of the stock in trade at that establishment .... For either first or second degree obscenity, the person would have to know the content and character of the material."

Further, Michigan law limits criminal prosecution under its obscenity law to the following "persons".

> "an individual, or a sole proprietorship, partnership, corporation, or other legal entity, or an agent or servant of an individual or legal entity." MCL 752.363(1); MSA 28.579(363)(1); (Pet. p E-4).

But the only individuals who may be prosecuted are those who have discretion with regard to the dissemination of obscene material or those who are involved in the management of the employer. MCL 752.367(b); MSA 28.579(367)(b); (Pet. pp E-6 to E-7).

In addition, only "persons" who disseminate for commercial gain are subject to criminal prosecution. MCL 752.362(2); MSA 28.579(362)(2); (Pet. p E-2).

Considering the narrow list of those who are subject to criminal prosecution, and the nature of their relationship to the business, the following statement of the New York Court of Appeals is particularly applicable:

> "[N]o merchant, regardless of the size and scope of his inventory, can survive economically unless he knows his stock."
>
> *People* v *Kirkpatrick*, 343 NYS2d 70, 77, 32 NY2d 17, 25, 295 NE2d 753, 758 (1973), (Bookseller promoting obscene material),

appeal dismissed for want of a substantial federal question, sub nom Kirkpatrick v *New York*, 414 US 948 (1973).

Considering the wording of the Section; the Legislative intent; and since Michigan's first degree obscenity section only applies to a legal entity, or to an individual who has discretion with regard to dissemination of obscene material or is involved in the management of the employer, and, even then only applies to those "persons" when disseminating for commercial gain for business at a particular establishment; the argument of a lack of scienter would seem to evaporate.

III

THE FOCUS OF MICHIGAN'S FIRST DEGREE OBSCENITY SECTION IS ON THE OBSCENE MATERIALS THEMSELVES RATHER THAN ON THE PLACE FROM WHICH THE MATERIAL IS SOLD.

Petitioners on page 13 unsuccessfully try to distinguish Michigan's first degree obscenity section from its second degree obscenity section by claiming that the first degree obscenity section accents "place", while the second degree obscenity section does not, and thus puts a burden on protected materials.

Both the first degree obscenity and second degree obscenity sections punish the dissemination of obscene material. MCL 752.365; MSA 28.579(365); (Pet. p E-5); MCL 752.366; MSA 28.579(366); (Pet. p E-6). "Disseminate" means to manufacture, sell, etc. to the public "for commercial gain". MCL 752.362(2); MSA 28.579(362)(2); (Pet. p E-2).

What petitioners are trying to do is equate Michigan's first degree obscenity section with nuisance laws that were found to be unconstitutional because those nuisance laws permitted the closing of a theater or a bookstore after it had been determined that substantially all of the magazines or films exhibited there were obscene.

> *J. R. Distributors* v *Elkenberry*, 725 F2d 482, 494 (9th Cir, 1984), *reversed and remanded, sub nom, Brockett* v *Spokane Arcades*, 472 US 491 (1985).
>
> *People ex rel Busch* v *Projection Room Theater*, 17 Cal3d 42, 58-59, 130 Cal Rptr 328, 337-338, 550 P2d 600, 609-610 (1976), *cert denied, sub nom Van de Kamp* v *Projection Room Theater*, 429 US 922 (1976).

The Sixth Circuit ignored this argument for good reason; Michigan's statute is not a nuisance statute directed against a place, rather it is a criminal statute directed toward a "person". MCL 725.365; MSA 28.579(365); (Pet. p E-5).

There is absolutely nothing in the Michigan statute directed toward a "place". The focus always remains on the dissemination of the obscene materials themselves.

IV

MICHIGAN'S FIRST DEGREE OBSCENITY SECTION ENHANCES THE AVAILABILITY AND DISSEMINATION OF CONSTITUTIONALLY PROTECTED MATERIALS.

Petitioners' argument on pages 17-23 that the heavier fines of the first degree obscenity section will be ruinous to those who wish to

disseminate protected materials ignores the bedrock of the complaint by the petitioners: The petitioners claim they do now know how much obscene material they may carry in their businesses before they are subjected to the higher fines.

Nothing happens to any "person" until a jury of a defendant's peers unanimously finds that a prosecutor has proved beyond a reasonable doubt

> that the defendant disseminated (or possessed with intent to disseminate) obscene material; and
>
> that the defendant knew the content and character of the material; and
>
> that dissemination of obscene material is a predominant part of the defendant's business at a particular establishment; and
>
> that dissemination of obscene material is a regular part of the defendant's business at that particular establishment; and
>
> that the principal or substantial part of the stock in trade at that establishment is obscene material. MCL 752.365(1); MSA 28.579(365)(1); (Pet. p E-5).

The penalty for a first offense ranges

> From no imprisonment up to imprisonment for not more than 1 year.
> MCL 752.365(2); MSA 28.579(365)(2); (Pet. p E-5);
>
> and/or
>
> From no fine, up to a fine of not more than $100,000.

MCL 752.365(2); MSA 28.579(365)(2); (Pet. p E-5).

The penalty for a first offense could even be a simple warning.

The heavier fine of which petitioners express such alarm can come only after another jury of a defendant's peers unanimously finds that these same elements have been proved beyond a reasonable doubt for a second time. MCL 752.365(3); MSA 28.579(365)(3); (Pet. p E-5).

Respondent submits that a person, who has once been convicted, would not chance a second conviction unless the money to be made is so enormous that the person is quite willing to continue to maintain a principal or substantial part of the stock in obscene material, to continue to have dissemination of obscene material a regular part of the business, and to continue to have dissemination of obscene material a predominant part of the business.

It is suggested that a lot of money is the real motivation. Therefore, deterring this money motivation is the real and effective solution. In other words, Michigan has said that if you are found guilty a second time, we are going to hit you hard in the pocketbook.

To avoid prosecution under Michigan's first degree obscenity section; one need only increase Constitutionally protected materials so that they are the principal or substantial part of the stock in trade; or make the dissemination of Constitutionally protected materials the predominant part of the business; or make the dissemination of Constitutionally protected materials the regular part of the business.

V

THERE IS A RATIONAL BASIS FOR MICHIGAN'S CLASSIFICATION OF PERSONS WHO DISSEMINATE OBSCENE MATERIAL FOR COMMERCIAL GAIN.

Petitioners do not complain of Michigan's definition of "obscene", (Pet. p 4 and p C-4); nor do they deny that some of the materials they disseminate for commercial gain may be obscene. (Pet. p B-4).

Petitioners argue on pages 21-23 of their petition that Michigan's differential treatment between first degree obscenity violators and second degree obscenity violators is a denial of equal protection.

Michigan's obscenity law concerns the prosecution of disseminators for commercial gain of obscene materials.

> "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationshp to a legitimate public purpose."
>
> *Plyer* v *Doe*, 457 US 202, 216 (1982).
>
> *See*: Note: 100 Harv L Rev 1146 (1987).

As appears in the Michigan Senate Analysis Section Analysis dated December 13, 1984, the

purpose of Michigan's anti-obscenity legislation is to dry up the market for obscenity by making it unprofitable, a valid purpose recognized by this Court in *New York* v *Ferber*, 458 US 747, 760 (1982). This purpose is shown by the added conditions that distinguish Michigan's first degree obscenity section from its second degree obscenity section. Michigan's first degree obscenity section is aimed at those who specialize in obscenity as the major business activity. Included in those who may be covered by the first degree obscenity section are those distributors and warehouse persons for whom obscene materials are a predominant and regular part of their business, and who have obscene materials as a principal or substantial part of their stock in trade.

The Michigan Legislature's attempt to dry up the market for obscenity being a rational basis for the challenged classification, there is no breach of the Equal Protection Clause.

CONCLUSION

For reasons stated in this brief, Respondent Michigan Attorney General Frank J. Kelley respectfully requests that this Court deny the petition for certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

George H. Weller
Assistant Attorney General

Attorney for Respondents

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